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No. ———

In the Supreme Court of the United States

JEFFORY C. YOUNG and MORRIS ROLLER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Courts of Appeal are in error in relying on Watts v. United States, 519 U.S. 148 (1997) to justify using acquitted conduct to increase a defendant's Guideline range under the Sixth Amendment?

Whether the right to a jury trial as guaranteed by the Sixth Amendment prohibits the district court from increasing a defendant's guideline range on the basis of acquitted conduct when it has been specifically rejected by the jury?

PARTIES TO THE PROCEEDINGS

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The opinion of the United States Court of Appeals for the Sixth Circuit is published at 553 F.3d 1035. Pet. App. A. A partial transcript of the relevant portion of the sentencing hearing in the district court is Appendix K to the petition. Pet. App. K.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 2009. Pet. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Pet. App. G. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Pet. App. G.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The relevant portions of the Sentencing Reform Act and the United States Sentencing Guidelines are reproduced at Petition Appendix G and H. Pet. App. G & H.

STATEMENT OF THE CASE

Petitioners Jeffory C. Young and Morris Roller were convicted of conspiracy involving more than 100 but less than 1000 marijuana plants and more than

100 but less than 1000 kilograms of marijuana, along with substantive offenses. The jury acquitted the petitioners of conspiracy involving more than 1000 marijuana plants and more than 1000 kilograms of marijuana. Pet. App. I & J. Notwithstanding the jury's verdict, and over petitioners' objections at sentencing, the district court used acquitted conduct to increase the petitioners' base offense levels from the lowest Level of 26 to Level 32 under the United States Sentencing Guidelines. See U.S.S.G. §2D1.1(c)(4); Pet. App. H & K. The district court also found the petitioners were leaders/organizers and applied the four level enhancement. See U.S.S.G. § 3B1.1(a); Pet. App. H & K. In Petitioner Roller's case, the district court imposed a 200 month sentence, from a guideline range of 188-235 months, rather than a sentence in the Guideline range of 97 to 121 months based on its finding by a preponderance of the evidence that the conduct involved more than 1000 plants and/or 1000 kilograms of marijuana. Pet. App. K. In Petitioner Young's case, the district court imposed a 224 month sentence, from a guideline range of 188 to 235 months, rather than a sentence in the Guideline range of 97 to 121 months based on its finding by a preponderance of the evidence that the conduct involved more than 1000 plants and/or 1000 kilograms of marijuana. Pet. App. K. The jury was specifically asked to determine the amount of marijuana involved and they rejected an amount over 1000 plants and/or 1000 kilograms. Pet. App. I & J. In a divided 2-1 decision, the Sixth Circuit rejected the petitioners' claim that the district court violated their right to trial by jury under the Sixth Amendment. Pet. App. A.

A. Factual Background and Relevant Trial Evidence

After an investigation involving confidential informants, wiretaps, undercover recordings, and surveillance, Roller and Young were arrested for various offenses relating to the production and distribution of marijuana over many years. Roller and Young admitted that they had sold marijuana but argued that it was not on the great scale that the Government was alleging. The largest amount of marijuana that the Government attempted to prove belonged to the petitioners was an estimated 2318 pound (1053.6 kilograms) load of marijuana that came from Mexico to property that petitioners owned but rented to a Hispanic male. The petitioners contested that they were connected to the 2318 pound load, and the jury's verdict shows that the jury did not believe the 2318 pound load was attributable to the petitioners.

The testimony at trial showed that a white truck, resembling Young's, was seen in the area on the day of the delivery and that Roller and Young changed cars frequently that day because they were afraid the Mexicans would come after them. Pet. App. A. However, the evidence also showed that Jamie Valdivia-Perez, who was renting the property at the time, was one of the individuals arrested and charged with the 2318 pound load in the Middle District of Tennessee. Pet. App. A. According to Special Agent Balsamo, Young was in the area at the time of the delivery and agreed to interview with Balsamo shortly thereafter. Balsamo admitted that but for Young's agreeing to an interview shortly after the delivery, Balsamo would have not known that Young was

present on that day. Young told Balsamo that he had rented the property where the delivery was made to several Hispanics, who had expressed an interest in the property. Young was in the area on the day of the delivery dropping off a lawnmower to one of his renters, Jamie Valdivia Perez, who was later arrested and charged with accepting delivery of the marijuana. Young had no knowledge of the delivery and did not know the Hispanic men who made the delivery. A witness testified that the owner of the 2318 pound load was seen apologizing to Young for law enforcement being on the property. There was little other evidence that Roller and Young dealt in quantities of marijuana as large as a 2318 pound load. Pet. App. A.

Petitioners were named in a twenty count superseding indictment on October 11, 2006, charging the petitioners with one count of conspiracy to distribute more than 1000 plants and/or 1000 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and various substantive offenses. Pet. App. G. Petitioners did not testify at the trial but through counsels' arguments, the petitioners admitted to the substantive counts but denied that the conspiracy was as large as the Government was alleging and denied any connection with the 2318 pound truckload of marijuana. On February 7, 2007, the jury found Petitioner Roller guilty of nine counts of distributing marijuana, four counts of use of a telephone to distribute marijuana, and on a lesser included offense of the conspiracy charge. The jury also found Petitioner Young guilty of two counts of aiding and abetting the possession of marijuana, four counts of use of a telephone to distribute marijuana, and on a lesser included offense of the conspiracy charge. The jury found the petitioners not guilty of

distributing more than 1000 kilograms of marijuana or more than 1000 plants. The jury instead found the petitioners guilty of the lesser amount of more than 100 but less than 1000 kilograms/plants of marijuana. Pet. App. I & J.

B. Sentencing

The district court sentenced the petitioners on May 7, 2007. Based on the jury verdict and a finding that Roller and Young were leaders or organizers, the adjusted offense level under the United States Sentencing Guidelines should have been a level 30 with a range of 97 to 121 months in Criminal History Category I.[1] Pet. App. A. However, finding by a preponderance of the evidence that the petitioners were also accountable for the 2318 pound load of marijuana, which the jury clearly rejected with its not guilty verdict, the district court added four levels to the base offense level for the amount of marijuana involved under §2D1.1 of the Guidelines. See U.S.S.G

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[1] Petitioners were found to be responsible by the jury for between 100 and 1000 kilograms/plants of marijuana. The United States Sentencing Guidelines provides a Level 26 for 100 to less than 400 kilograms/plants, Level 28 for 400 to less than 700 kilograms/plants, and Level 30 for 700 to less than 1000 kilograms or plants. The jury did not specify within the range of 100 to less than 1000 kilograms/plants that it was finding. However, its verdict clearly rejects the 2318 pound load as being attributable to the petitioners. Removing 2318 (1053.6 kilograms) pounds from the district court's estimate that Petitioner Roller was responsible for 2744 pounds (1247.3 kilograms), leaves a new total of 426 pounds (193.6 kilograms), and thus a base offense level of 26. Removing the 2318 pounds from the district court's estimate that Petitioner Young was responsible for 2848 pounds (1294.5 kilograms), leaves a new total of 530 pounds (240.9 kilograms).

§2D1.1(c)(4)-(7); Pet. App. H. By finding that the petitioner was responsible for the 2318 pound load by a preponderance of the evidence, the district court increased the petitioners' offense levels to a Level 36, with a range of 188 to 235 months in Criminal History Category I, and sentenced Petitioner Roller to 200 months in prison, a sentence 79 months, or 6.5 years, longer than the top of the guideline range applicable to the facts found and the facts rejected by the jury, and sentenced Petitioner Young to 224 months in prison, a sentence 103 months, or 8.5 years, longer than the top of the guideline range applicable to the facts found and the facts rejected by the jury. Pet. App. A.

C. Proceedings on Appeal

Petitioners challenged their convictions and sentences on appeal. On January 30, 2009, the Sixth Circuit affirmed the convictions. Pet. App. A. Petitioners appealed numerous issues, including that the district court violated their Sixth Amendment rights to a jury trial, due process rights, and United States v. Booker, 543 U.S. 220, 240, 125 S. Ct. 738, 754 (2005), by increasing their sentences based on its findings regarding the amounts of marijuana involved which the jury had rejected. On January 30, 2009, a panel of the Sixth Circuit affirmed the sentence in a 2 to 1 decision, with one member of the panel dissenting in part, based on his disagreement with the use of acquitted conduct to enhance the petitioners' sentences because it is inconsistent with the right to trial by jury under the Sixth Amendment. Pet. App. A. Petitioners sought a rehearing en banc, which was denied on April 1, 2009. Pet. App. F.

REASONS FOR GRANTING THE PETITION

The question of whether a district court may rely on acquitted conduct in calculating the guideline range under the United States Sentencing Guidelines without violating the Sixth Amendment to the United States Constitution has not been decided by this Court. However, the Courts of Appeal and the district courts mistakenly believe that they are bound by the precedent of Watts v. United States, 519 U.S. 148, 117 S. Ct. 633 (1997) and are prevented from holding that a district court violates a defendant's Sixth Amendment rights when basing the guideline range on conduct for which a jury has found a defendant not guilty.

What appears to be an agreement among the circuits on this issue is not what it seems. The Courts of Appeal uniformly accept the use of acquitted conduct to determine a sentencing range and rely on the fact that their "sister circuits are doing it." However, the individual circuits are divided within. Many circuit judges have written strong dissents or concurring opinions explaining that they felt bound to follow precedent they disagreed with.

This case arises from the Sixth Circuit, which is a court that is strongly divided. In a 9 to 6 decisions, the Sixth Circuit followed its sister circuits in finding that Watts allowed for the use of acquitted conduct to determine the sentencing range. See United States v. White, 551 F.3d 381 (6th Cir. 2008). Although a majority, this en banc decision of the Sixth Circuit shows that 40% of the judges in the Sixth Circuit believe that the Sixth Amendment is being violated each time that a district court uses acquitted conduct

to increase a sentencing range. The panel of the Sixth Circuit in this case followed the mistaken precedent set by White and led to a result that was incorrect, unjust, and unconstitutional.

Until this Court addresses the issue, cert petitions will continue to be filed asking this Court to determine this constitutional issue once and for all. See United States v. Brooks, 310 Fed. Appx. 880 (6th Cir. 2009) petition for cert. filed, No. 08-10456 (U.S. May 14, 2009); United States v. Royer, 549 F.3d 886 (2nd Cir. 2008), petition for cert. filed, No. 08-10328 (U.S. May 11, 2009) & No. 08-10357 (U.S. May 12, 2009); United States v. Armstrong, 550 F.3d 382 (5th Cir. 2008), petition for cert. filed, No. 08-9339 (U.S. Mar. 16, 2009). There are many other cases in which defendants, similarly situated to the petitioners, have raised the Sixth Amendment issue relating to acquitted conduct, and the Circuits across the County have relied on this mistaken and unconstitutional precedent for using acquitted conduct, and for which this Court may receive petitions for certiorari. See United States v. Rodebaugh, 561 F.3d 864 (8th Cir. 2009); United States v. Robles, Nos. 07-1013-cr, 07-1027-cr, 07-1221-cr, 2009 WL 943723 (2nd Cir. 2009); United States v. Perry, 560 F.3d 246 (4th 2009); United States v. Valdes, No. 07-14721, 2009 WL 684751 (11th Cir. 2009); United States v. Taylor, No. 08-2264, 2009 WL 382522 (7th Cir. 2009); United States v. Semikian, 307 Fed. Appx. 107 (9th Cir. 2009).

With the divisions within each of the Courts of Appeal, it is almost certain that one day, the majority of one of the circuits will be taking the position now posited by the minorities. Rather than wait for this to happen and have defendants all over this country, and

possibly for many years, making the same argument and seeking appellate review in both Courts of Appeal and this Court, this Court can decide the issue, so as to provide the divided circuit courts of this Country with a case directing the appropriate answer to the questions presented.

Not only do many defendants have their sentences enhanced based on acquitted conduct, but this practice is potentially devastating to our Country's system of justice. The jury trial is one of the Constitutional rights in which our justice system is based. Defendants, their families, and members of the public are shocked to find out that in federal court, a jury's verdict of acquittal does not carry the weight that was intended by our founding fathers. This Court needs to either correct the Courts of Appeal that have held that acquitted conduct does not violate the Sixth Amendment or explain to the defendants in this Country and to the American public why the Sixth Amendment right to a jury trial can be overturned by a sentencing judge using a lower standard of proof in federal court.

Prosecutors can now overcharge a defendant, knowing that even if the jury splits and only returns guilty verdicts on some charges, that when they ask for an enhanced sentence based on acquitted conduct, the judges will likely agree. Under the current system, unless an individual is innocent of every charge, the right to a trial by jury means nothing. The Constitution does not guarantee the right to trial by jury only to the innocent. For example, if an individual is charged with 100 counts of selling cocaine, but only sold cocaine on one occasion, the jury can find him guilty of only that 1 count. The jury

system would work in that instance until it comes to sentencing. The sentencing judge could then decide that by a preponderance of the evidence that he believes the informants that testified that the defendant had sold cocaine 100 times and can then sentence the defendant for all 100 counts. How can anyone argue that this system of justice is working? Allowing someone to be sentenced based on conduct for which they are acquitted makes our entire jury system illusory. This Court should review this issue not only because there are splits within the Courts of Appeal themselves, but because a Constitutional right is at great risk of being abolished through this Court's consistent denial of determining this issue.

This case presents a particularly compelling reason why this Court should address this issue. Based on Roller's age of 56 and Young's age of 51, the difference between sentences accounting for acquitted conduct and sentences based on the jury's verdicts is that the sentences imposed could be life sentences. The sentences imposed mean that petitioners will be around 70 years old when they are released, if they are able to survive in prison for more than 16 years or so. If sentences were imposed reflecting only the conduct for which the jury found the petitioners guilty, it could save the petitioners many years off their sentences and may allow them to live their last years outside prison walls. The marijuana offenses for which the petitioners were convicted are not offenses deserving of a life sentence.[2]

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[2] Judge Merritt wrote in his dissent in this case that "I would reverse and remand for a further explanation of why such a long sentence is justified, especially in light of the great disparity in

I. ARE THE COURTS OF APPEAL IN ERROR IN RELYING ON WATTS v. UNITED STATES, 519 U.S. 148, 117 S. Ct. 633 (1997), TO JUSTIFY THEIR USE OF ACQUITTED CONDUCT TO INCREASE DEFENDANTS' GUIDELINE RANGES UNDER THE SIXTH AMENDMENT?

This Court's decision in Watts v. United States, 519 U.S. 148, 156, 117 S. Ct. 633 (1997), left the question unanswered of whether relying on acquitted conduct in sentencing violates the right to a jury trial under the Sixth Amendment. United States v. Booker, 543 U.S. 220, 240, 125 S. Ct. 738, 754 (2005). Watts addressed "a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause." Id. at 240 n.4, 125 S. Ct. at 754. "In neither Witte nor Watts was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." Id. at 240, 125 S.Ct. at 754 (citing Witte v. United States, 515 U.S. 389, 115 S. Ct. 2199 (1995); Watts v. United States, 519 U.S. 148, 117 S. Ct. 633 (1997)); see also United States v. Faust, 456 F.3d 1342, 1350 (11th Cir. 2006) (Barkett, J., concurring) (stating that in Watts, this Court did not consider if the sentencing enhancement exceeding the sentence authorized by the jury violated the Sixth Amendment). Watts did not even have the benefit of full briefing or oral argument

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sentencing for such relatively minor marijuana crimes between the state and federal courts and among federal judges themselves. These [petitioners] will be over 70 years old when they get out of jail, if they live that long. The cost of their incarceration, including health care, will be enormous. The sentences seem irrational to me – too irrational for me to defer." Pet. App. A, p. 40a-41a.

before this Court. Booker, 543 U.S. at 240 n.4, 125 S.Ct. 738.

The Courts of Appeal and the district courts have misunderstood the scope of Watts. Watts did not address whether the use of acquitted conduct violated the Sixth Amendment. This was not the question asked, nor the questioned answered, in Watts. However, this is a question that has been brought to this Court repeatedly by defendants asking for this Court to address the Sixth Amendment violations that are occurring whenever a jury acquits a defendant of an offense but the sentencing judge considers the acquitted conduct to increase the sentencing range. See United States v. Frampton, 307 Fed. Appx. 535 (2nd Cir. 2009), cert denied 2009 WL 116331 (U.S. May 26, 2009); United States v. White, 551 F.3d 381 (6th Cir. 2008), cert. denied 129 S.Ct. 2071 (U.S. Apr. 27, 2009); United States v. Dewitt, 304 Fed. Appx. 365 (6th Cir. 2008), cert. denied 129 S.Ct. 2024 (U.S. Apr. 20, 2009); United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008), cert. denied, 129 S.Ct. 999 (U.S. Jan. 21, 2009); United States v. Hurn, 496 F.3d 784 (7th Cir. 2007), cert. denied 128 S.Ct. 1737 (U.S. Mar. 31, 2008); United States v. Mercado, 474 F.3d 654 (9th Cir. 2007), cert denied 128 S.Ct. 1736 (U.S. Mar. 31, 2008); United States v. Jones, 194 Fed. Appx. 196 (5th Cir. 2006) cert denied 549 U.S. 1066 (U.S. Nov. 27, 2006); United States v. Ashworth, 139 Fed. Appx. 525 (4th Cir. 2005) cert denied 128 S.Ct. 1738 (U.S. Mar. 31, 2008); United States v. Price, 418 F.3d 771 (7th Cir. 2005), cert denied 128 S.Ct. 669 (U.S. Nov. 26, 2007).

There is not a split between Circuits on this issue, however there is a split within the Circuits. See United States v. White, 551 F.3d 381 (6th Cir. 2009)

(Merritt, J., concurring in part and dissenting in part); United States v. Canania, 532 F.3d 764 (8th Cir. 2008) (Bright, J., concurring); United States v. Mercado, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting); United States v. Faust, 456 F.3d 1342 (11th Cir. 2006) (Barkett, J., concurring); United States v. Grier, 475 F.3d 556 (3rd Cir. 2006) (McKee, J., dissenting).

The Courts of Appeal that have addressed this issue have recognized that Watts did not address the issue raised here and have recognized this Court has not addressed the issue raised here, but have relied on the fact that because everyone else says it is Constitutional, we will follow suit. See United States v. Dorcely, 454 F.3d 366, 371 (D.C. Cir. 2006) (acknowledging that the Supreme Court has not addressed if using acquitted conduct violates the Sixth Amendment, yet deciding there is no constitutional violation because every other circuit that had considered the issue said there was not); United States v. Gobbi, 471 F.3d 302, 314 (1st Cir. 2006) (relying on Dorcely to hold that post-Booker the law has not changed and acquitted conduct can be considered when found by a preponderance of the evidence); United States v. Jones, 194 Fed. Appx. 196, 198 (5th Cir. 2006) (stating Watts remains valid after Booker when holding that a sentencing court can consider conduct underlying an acquitted charge); United States v. Vaughn, 430 F.3d 518, 526 (2d Cir. 2005) (finding that Booker did not undermine the continued validity of Watts and that a judge could find a higher drug amount at sentencing although the jury had acquitted the defendant of the higher amount); United States v. Ashworth, 139 Fed. Appx. 525, 527 (4th Cir. 2005) (finding that post-Booker a district court can continue to consider acquitted conduct); United States v. Price,

418 F.3d 771, 788 (7th Cir. 2005) (joining "all the other courts that have confronted the issue in holding that the Supreme Court's holding in Watts remains the law after Booker). Judge McKee of the Third Circuit dissented and found no comfort in the fact that his sister circuits agreed on the issue. He stated that "before Booker was decided, one could have developed an even more impressive list of the courts that had incorrectly concluded that Apprendi does not apply to the federal sentencing guidelines." United States v. Grier, 475 F.3d 556, 606 (3rd Cir. 2006)(McKee, J., dissenting).

The Ninth Circuit, which acknowledged that this Court had not considered the Sixth Amendment issue in Watts, still felt bound to follow Watts because every other Court of Appeals to consider the issue held that using acquitted conduct at sentencing did not violate the Constitution. United States v. Mercado, 474 F.3d 654, 656-57 (9th Cir. 2007). Mercado was a split decision, showing a division within the Ninth Circuit. Judge Fletcher wrote in her dissent, which was significantly longer than the opinion itself, that

> In Booker, the Court explained that Watts addressed only a very narrow Fifth Amendment issue unrelated to the Sixth Amendment question then before the Court . . . As the Court emphasized, Watts did not consider, let alone decide, whether the Sixth Amendment was violated by reliance on acquitted conduct at sentencing.

Mercado, 474 F.3d at 658 (Fletcher, J., dissenting).

The Eighth Circuit is also divided regarding the use of acquitted conduct. United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008). Judge Bright wrote a concurring opinion but felt compelled to do so:

> Bound by Supreme Court precedent, I reluctantly concur with my colleagues in affirming [the defendants] convictions and sentences. I write separately to express my strongly held view that the consideration of "acquitted conduct" to enhance a defendant's sentence is unconstitutional.

Canania, 532 F.3d at 776 (Bright, J., concurring).

The Eleventh Circuit is divided, and Judge Barkett reluctantly concurred in a case in which the use of acquitted conduct at sentencing was upheld. United States v. Faust, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring). Judge Barkett stated that

> I join the majority in affirming Faust's conviction, but concur in its sentencing decision only because I am bound by Circuit precedent . . . I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.

Faust, 456 F.3d at 1349 (Barkett, J., concurring).

Several of the Circuits have addressed this issue sitting en banc and have been divided in their opinion with judges filing dissenting and concurring opinions. In United States v. Grier, the Third Circuit was deeply divided with two concurring opinions and two dissenting opinions being filed. 475 F.3d 556 (3rd Cir. 2006). The lead opinion held that the preponderance of the evidence standard of proof applied in sentencing and that proof beyond a reasonable doubt only attached to facts that increased the statutory maximum punishment to which the defendant was exposed. Grier, 475 F.3d at 562. Judge Ambro, although concurring, expressed his disagreement with the preponderance of the evidence standard

> [The defendant] is in prison in part for a crime for which he was never indicted, never tried, and never convicted. His sentence is based to some extent on a judicial finding by a preponderance of the evidence, that he committed the crime of aggravated assault. This practice may be efficient. It may often reflect what "really" happened. But in my view it is not consistent with our Bill of Rights."

Grier, 475 F.3d at 562 (Ambro, J., concurring). Judge Ambro also stated that if he had not felt bound by Supreme Court precedent to concur in the judgment, he would have joined the dissent. Id. at 574-75. Judges Sloviter and McKee filed dissenting opinions in which they argued that under the Sixth Amendment and Booker and Cunningham, that any fact that exposes a defendant to a greater potential sentence must be found by a jury and established beyond a reasonable doubt. Grier, 475 F.3d at 590-91 (Sloviter,

J., dissenting). Judge McKee argues in his dissent that the Supreme Court precedent does not support the majority's opinion that sentencing facts used to enhance a sentence need to be determined only by a preponderance of the evidence. Grier, 475 F.3d at 604 (McKee, J., dissenting).

The fact that the Courts of Appeal are expanding the scope of Watts, which this Court has said addressed a very narrow issue, to justify the violation of a constitutional right requires that this Court step in and address this issue. See Booker, 543 U.S. at 240 n.4, 125 S. Ct. at 754. Otherwise, the Courts of Appeal and district courts will continue to violate the Sixth Amendment rights of defendants, while believing that Supreme Court precedent requires it. See United States v. Rodebaugh, 561 F.3d 864, 871 (8th Cir. 2009)(relying on circuit precedent without addressing the constitutional issue any further); United States v. White, 551 F.3d 381, 386 (6th Cir. 2009) (stating that Watts continues to be valid, which has also been the holding of its sister circuits); United States v. Bateman, 218 Fed. Appx. 759, 763 (10th Cir. 2007) (stating that defendant's Sixth Amendment argument is foreclosed by circuit precedent).

District courts have also expressed disagreement with the use of acquitted conduct at sentencing and some have refused to consider it. Judge Marbley of the Southern District of Ohio stated that "acquitted conduct should always be considered using a reasonable doubt standard; otherwise, a defendant's Sixth Amendment right to a jury trial is eviscerated." United States v. Coleman, 370 F. Supp.2d 661, 668 (S.D. Ohio 2005) (stating it would not marginalize the jury's verdict by allowing the government another

opportunity to make a failed case). Judge Gertner of the District of Massachusetts opined that Booker

> substantially undermines the continued validity of [Watts] both by its logic and by its words. It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to the sentencing have been determined by a judge rather than a jury . . . and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing.

United States v. Pimental, 367 F. Supp.2d 143, 150 (D. Mass. 2005). Judge Kelly of the Eastern District of Virginia was reversed by the Fourth Circuit because he declined to consider acquitted conduct. United States v. Ibanga, 271 Fed. Appx. 298 (4th Cir. 2008) (reversing United States v. Ibanga, 454 F. Supp.2d 532 (E.D. Va. 2006))[3].

"Despite Apprendi and its progeny, we continue to allow sentencing judges, once a jury has found beyond

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[3] Judge Kelley explained, "Punishing [the defendant] for his acquitted conduct would have contravened the statutory goal of furthering respect of the law and would have resulted in unjust punishment for the offense for which he was convicted[.] . . . What could instill more confusion and disrespect than finding out that you will be sentenced to an extra ten years in prison for the alleged crimes of which you were acquitted? The law would have gone from something venerable and respected to a farce and a sham. From the public's perspective, most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they are acquitted." Ibanga, 454 F. Supp.2d at 539.

a reasonable doubt that a defendant has committed one crime, then to find him guilty by a preponderance of the evidence of other crimes for which he was not tried-or worse, tried, and acquitted-and to sentence him as if he had been convicted of them as well." United States v. Grier, 475 F.3d 556, 574 (3rd Cir. 2005) (Ambro, J., concurring). "The Founders were keenly aware, though, th t 'the jury right could be lost not only by gross denial, but by erosion' . . . Indeed, they recognized the need to be particularly circumspect about such incremental degradations, 'which under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.'" United States v. White, 551 F.3d 381, 393-94 (Merritt, J., dissenting) (quoting Jones v. United States, 526 U.S. 227, 248-49, 119 S. Ct. 1215 (1999)).

This Court has denied cert on this issue in many cases since Booker was passed. Until the Court decides to address this issue, it is likely that the petitions for cert will continue to be filed from all Courts of Appeal across the Country and defendants' Sixth Amendment rights will continue to be violated. The Courts of Appeal who have addressed the issue raised here have read Watts too broadly. Watts addressed only the Fifth Amendment. Booker, 543 U.S. at 240 n.4; 125 S. Ct. at 754. Allowing Courts of Appeal to say that Watts held that using acquitted conduct at sentencing does not violate the Constitution suggests that all constitutional issues were considered. Watts did not, and this Court has not, addressed if the Sixth Amendment is violated by use of acquitted conduct at sentencing. Id. It is time for this Court to do so.

II. THIS COURT SHOULD ADDRESS AN ISSUE THAT HAS NOT BEEN DECIDED BY THIS COURT BEFORE: WHETHER THE RIGHT TO A TRIAL BY JURY UNDER THE SIXTH AMENDMENT PROHIBITS SENTENCING COURTS FROM RELYING ON ACQUITTED CONDUCT TO DETERMINE THE SENTENCING GUIDELINE RANGE.

The Sixth Amendment right is "implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'" Booker, 543 U.S. at 232, 125 S. Ct. at 749. "A judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence." United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring). "[U]nder the guise of 'judicial discretion,' we have a sentencing regime that allows the Government to try its case not once but twice. The first time before a jury, the second before a judge." United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring).

The Framers of the Constitution wanted to guarantee an absolute right to a jury trial in criminal cases. U.S. Const. Art. III, §2, cl. 3; U.S. Const. amend. VI. The jury's role was to "stand between the individual and the power of the government," Booker, 543 U.S. at 237, 125 S.Ct. at 752, and to confirm the truth of every accusation. United States v. Gaudin, 515 U.S. 506, 514 (1995). Justice Kennedy stated in his dissent in Watts that "to increase a sentence based on conduct underlying a charge for which the

defendant was acquitted does raise concerns about undercutting the verdict of acquittal." United States v. Watts, 519 U.S. at 170, 117 S.Ct. at 644 (Kennedy, J., dissenting).

Since Watts was decided, the Supreme Court has issued a series of opinions that have emphasized the importance of the jury's role in our system of justice but has not addressed the issue raised herein. See Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456 (2007) (holding that federal appellate courts could apply a presumption of reasonableness to a district court's sentence that reflects a proper application of the sentencing guidelines); Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007) (holding California's determinate sentencing law, which authorized a judge to find facts to impose an upper term sentence, violated the right to a trial by jury); United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005) (holding the mandatory guideline system was unconstitutional); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2537 (2004) (invalidating a state mandatory sentencing guideline system and holding that when a judge imposes punishment that the jury's verdict alone does not authorize, the judge has exceeded his proper authority); Apprendi v. New Jersey, 530 U.S.466, 490, 120 S.Ct. 2348 (2000) (invalidating a state hate crime enhancement because it doubled the maximum jury-authorized sentence because any fact that increased the penalty beyond the statutory maximum must be submitted to a jury).

Circuit court judges have asked this Court for direction on the use of acquitted conduct. Judge Bright of the Eighth Circuit wrote

> Because I believe the inclusion of "acquitted conduct" to fashion a sentence is unconstitutional, I urge the Supreme Court to re-examine its continued use forthwith. Absent its intervention, I fear the courts of appeals will again refuse to recognize the full import of Apprendi and its progeny. . . . And as a consequence, defendants will continue to receive unfair punishments for years to come.

United States v. Canania, 532 F.3d 764, 777-78 (8th Cir. 2008) (Bright, J., concurring). Judge Merritt of the Sixth Circuit in the petitioner's case concurred in part and dissented in part stating that

> Although I concur that we must defer to the majority opinion in United States v. White, it is not final for all purposes and is likely to be reversed by the Supreme Court. These two enhancements are the basis for the long sentences and are inconsistent with the right of trial by jury under the Sixth Amendment, as I explained in White. Counsel for the defendants should keep the cases open until we find out what happens to the White case in the Supreme Court.

United States v. Young, 553 F.3d 1035, 1056 (6th Cir. 2009) (Merritt, J., concurring in part and dissenting in part). This Court denied cert in White, on April 27, 2009, despite Judge Merritt's belief that this Court would address the issue. White v. United States, 129 S. Ct. 2071 (2009). Declining to decide this issue, allows federal courts to repeat the mistake of wrongly

depriving individuals of their Constitutional rights under the Sixth Amendment.

The fact that the Guidelines are now advisory under Booker does not cure the constitutional violation under the Sixth Amendment that using acquitted conduct at sentencing to enhance a guideline range creates. The Guidelines "remain at the center of the sentencing process, and continue to have a predominant role in determining the sentence that is imposed." United States v. Grier, 475 F.3d 556, 562 (3rd Cir. 2006)(McKee, J., dissenting). The fact finding used to calculate the guideline range has remained determinate despite the guideline range itself being advisory. The fact finding directly impacts the sentencing length because the guideline range is the benchmark at which all district courts are to begin their sentencing analysis. Gall v. United States, 552 U.S. 38, 128 S. Ct. 586, 597 (2007).

"National data show that when within-range sentences are combined, the rate of sentencing in conformance with the guidelines is 85.9%." United States v. Grier, 475 F.3d 556, 609 .(3rd Cir. 2006)(McKee, J., dissenting) (citing U.S. Sentencing Comm'n, Report on the Impact of the United States v. Booker On Federal Sentencing, 18 Fed. Sent. R. 190, 192 (2006)). This statistic shows the real impact of allowing judges to consider acquitted conduct. Even if a sentence does not exceed the statutory maximum, the effect of allowing acquitted conduct to be considered in calculating the sentencing range is that defendants will receive higher sentences even though the guidelines are no longer mandatory. Because of "guidelinitis" that exists among the district courts, the reliance on the fact that the guidelines are no longer

mandatory does not correct the Sixth Amendment violation that is occurring. See United States v. Sexton, 512 F.3d 326, 337 (6th Cir. 2008) (Merritt, J., dissenting) (defining "guidelinitis" as the inability of most federal courts to break the habit of mechanically relying on the guidelines alone). The fact the guidelines are now advisory does not matter when the district courts still give deference to the guidelines and effectively treat them as mandatory.

"The appropriate inquiry is whether a sentence has been authorized by the jury, not whether a sentence is below the statutory limit." Mercado, 474 F.3d at 661 (Fletcher, J., dissenting). Just because the jury has authorized a punishment does not mean that the jury has authorized any punishment. Mercado, 474 F.3d at 663 (Fletcher, J., dissenting). What the holding in the petitioner's case means is that the statutory maximum is the maximum sentence allowed under the statute, in this case 40 years. In many cases the sentencing range established by the Guidelines does not come anywhere close to the statutory maximum. Making the guidelines advisory did not fix the problem that using acquitted conduct to enhance sentencing ranges violates the Sixth Amendment. Nothing has really changed with regard to the use of acquitted conduct to enhance sentences other than justifications being given by the district courts for why they can consider such conduct without violating the Sixth Amendment.

The Courts of Appeals are permitted to give a presumption of reasonableness to a guideline sentence. Gall v. United States, 552 U.S. 38, 128 S. Ct. 586, 597 (2007). Even though district courts are not allowed this presumption, sentencing judges know that if a case goes up on appellate review that the Courts of

Appeal can give the guideline sentence a presumption of reasonableness. Because sentencing courts are directed to start with the guideline range when determining a sentence, the guideline range is more than simply advisory. It is the beginning point of every sentence.

In the petitioners' case, the sentencing judge's determination that the amount of drugs was over 1000 kilograms, when the jury said it was less than 1000 kilograms[4], raised the petitioners' range from 97 to 121 months to 188 to 235 months, the range found by the district court. The latter range became the sentencing judge's starting point and the main factor driving the sentencing court's decisions. The sentencing judge imposed a sentence of 200 months on Petitioner Roller and a sentence of 224 months on Petitioner Young, thus exceeding the range authorized by the jury's verdict.

The jury in this case necessarily rejected that the amount of marijuana involved was over 1000 kilograms because it returned a specific verdict of not guilty for that particular amount and found a lower amount of between 100 and 1000 kilograms. Pet. App. I & J. Through its verdict, the jury rejected that the 2318 pound load of marijuana belonged to the petitioners.

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[4] The jury's verdict shows that it rejected the Government's assertion that the 2318 pound load of marijuana belonged to the petitioners. Therefore, if the 2318 pounds is subtracted from the amounts attribute to each petitioner, the amounts are less than 400 kg, and thus would be a base level 26 for the amount of marijuana.

When the Courts of Appeal are misapplying this Court's decisions, it is up to this Court alone to step in and to correct them. See e.g. Spears v. United States, 129 S.Ct. 840 (2009) (reversing Eighth Circuit decision on remand because it was in direct conflict with Supreme Court's decision in Kimbrough v. United States, 128 S. Ct. 858 (2007)). Justice Kennedy's statement in Watts is applicable to the Sixth Amendment issue which is raised here today:

> [I]t must be noted the case raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system. We have not decided a case on this precise issue, for it involves not just prior criminal history but conduct underlying a charge for which the defendant was acquitted. At several points the per curiam opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off.

Watts, 519 U.S. at 170, 117 S.Ct. at 644.

CONCLUSION

For the reasons, given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-5600/5608

[Filed January 30, 2009]

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)
v.	)
JEFFORY C. YOUNG (07-5600), MORRIS ROLLER (07-5608), *Defendants-Appellants.*	)

Appeal from the United States District Courts
for the Eastern District of Tennessee
at Winchester and Chattanooga.
No. 06-00014—R. Allan Edgar, District Judge.

Argued: December 5, 2008

Decided and Filed: January 30, 2009

Before: MERRITT, MOORE, and COLE, Circuit Judges.

COUNSEL

ARGUED: Peter J. Strianse, TUNE, ENTREKIN & WHITE, Nashville, Tennessee, Gerald H. Summers, SUMMERS & WYATT, Chattanooga, Tennessee, for Appellants. Perry H. Piper, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellee. **ON BRIEF:** Peter J. Strianse, TUNE, ENTREKIN & WHITE, Nashville, Tennessee, Gerald H. Summers, Marya L. Schalk, SUMMERS & WYATT, Chattanooga, Tennessee, for Appellants. Perry H. Piper, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellee.

MOORE, J., delivered the opinion of the court, in which COLE, J., joined. MERRITT, J. (p. 29), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. In 2006, the government named Morris Roller ("Roller") and Jeffory Young ("Young") as defendants in a twenty-count superseding indictment. Count one charged both men with a conspiracy to manufacture 1000 or more marijuana plants and to distribute 1000 or more kilograms of marijuana. Roller and Young were tried jointly, and the jury convicted each man of conspiracy involving more than 100 but less than 1000 marijuana plants and more than 100 but less than 1000 kilograms of marijuana. Roller and Young were also convicted of the substantive offenses with which they were charged. The district court sentenced Roller to serve 200 months and Young to serve 224 months of

imprisonment. Roller and Young appeal their convictions and their sentences.

On appeal, Roller and Young allege that: (1) the district court erroneously admitted hearsay; (2) the district court erred when it applied a leadership-role sentencing enhancement; (3) the district court erred in considering acquitted conduct in sentencing; and (4) their sentences were procedurally and substantively unreasonable. Young also argues that the district court erred when it admitted statements by Roller regarding the use of force to collect drug-related debts. Roller asserts that the district court's response to the jury's question regarding the duration of the conspiracy was prejudicial error. We **AFFIRM** Roller's and Young's convictions and sentences.

I. BACKGROUND[1]

After an investigation involving confidential informants, wiretaps, and surveillance, Roller and Young were arrested for various crimes relating to marijuana growing and distribution. Based on this investigation, Roller and Young were indicted by a grand jury in 2006. A few months later, the government filed a superseding twenty-count indictment. The first count charged both men with a conspiracy to manufacture 1000 or more marijuana plants and to distribute 1000 or more kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). The indictment charged Roller with

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[1] This section contains a general summary of the testimony and evidence presented at trial; specific statements and information will be addressed in the analysis section where relevant.

thirteen additional counts and Young with six. Each of these substantive charges alleged distribution of marijuana or the use of a telephone to facilitate the delivery of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D). Roller and Young's joint trial began on January 29, 2007.

In its opening argument, the government contended that Roller and Young were involved in a large-scale, long-term conspiracy to grow, import, and distribute marijuana. Roller and Young admitted that they had sold marijuana, but contended that they had done so on a small scale and that they were not involved in the vast conspiracy described by the government. During the course of the trial, the government called fourteen witnesses.

The government began its case by calling Mark Delaney ("Delaney"), a special agent with the Tennessee Bureau of Investigation who was assigned to investigate Roller and Young. Delaney's testimony largely concerned the mechanics of the audio surveillance that investigators used in this case.

The government next called one of its key witnesses, a confidential informant, Julia Foutch ("Foutch"). At the time that she testified, Foutch was on probation for a felony conviction for reckless endangerment of a child and for manufacturing methamphetamine. Foutch acted as an informant in the hopes of helping her husband who was in prison for manufacturing methamphetamine. Most of Foutch's testimony concerned her recorded interactions with Roller. Per instructions from investigators, Foutch periodically purchased a pound of marijuana from Roller. Over the course of two

years, Foutch bought about sixteen pounds of marijuana from Roller. The majority of Foutch's conversations with Roller were recorded, and many of these recordings were played for the jury while Foutch was on the stand. After the jury listened, Foutch would explain the meaning of the recorded conversations.

Foutch testified that Roller and Young asked her to collect outstanding debts from Connie Holt ("Holt"), Kenny Stewart ("Stewart"), and Jimmy White ("White"), individuals who owed Roller and Young money for previous marijuana purchases. Foutch's attempts to collect money from these individuals were recorded, and recordings of her conversations with them were admitted.[2] Foutch asserted that when she went to collect money from Holt, Holt hit her in the head. Foutch testified that, as a result of this assault, Roller and Young sent others to collect Holt's debt and that these individuals kept Holt locked in her bedroom for three days.

In addition, Foutch testified that she agreed to try to obtain methamphetamine for Roller, that Roller sometimes made romantic advances towards her, and that she tried to accept Roller's offer to pay her

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[2] Statements made by Stewart, White, and Holt to Foutch form the basis for some of Roller's and Young's arguments on appeal. The district court admitted Stewart's and White's statements as nonhearsay statements of coconspirators under Fed. R. Evid. 801(d)(2)(E). Holt's statements were admitted as nonhearsay because the district court determined that they were introduced to provide context and not to prove the truth of the matter asserted. These statements will be discussed in greater detail infra.

$10,000 to drive to Dallas to pick up a load of marijuana. Importantly, Foutch also testified that at her first meeting with Roller, he told her that he had lost a truckload of marijuana at Judge Purser Hill Lane when the government intercepted it. This conversation was not recorded.

After Foutch's lengthy testimony, Greg Byford took the stand. At the time of his testimony, Byford was in jail serving a four-year sentence for his second methamphetamine-related felony conviction. The government granted Byford use immunity. Byford testified that between 1996 and 1999 he helped Roller and Young prepare marijuana for sale by "stripping" the plants. Byford explained that for a few days each year he, along with Roller, Young, and about six other people, would gather to remove the leaves from the stalks of approximately 350 marijuana plants per year.

After Byford testified, the government presented the testimony of a forensic chemist and a customs agent. The forensic chemist identified a variety of state exhibits as containing marijuana and testified as to the weights of each exhibit. The Immigration and Customs Enforcement Special Agent, James Balsamo ("Balsamo"), testified regarding the controlled delivery of a truck containing 2318 pounds of marijuana to 46 Judge Purser Hill Road on July 29, 2002. Balsamo explained that when the truck arrived, six Hispanic males unloaded the truck. Each of these individuals was later indicted on charges relating to the delivery. According to Balsamo, in addition to these six individuals, there were two white males present on the property on the day of the delivery. Balsamo stated that he saw a white pickup truck that looked like Young's truck at the delivery scene. Later Young

spoke with Balsamo voluntarily and admitted that he was on the property on the day of the delivery. Young told Balsamo that it was Young's property but that Young had been trying to sell it to the current occupant, Jaime Valdivia-Perez. Young maintained that he had no knowledge regarding the seized truck or its contents. On cross-examination, Balsamo testified that the property's electricity was in the name of Jaime Valdivia-Perez and that Jaime Valdivia-Perez was arrested at the time of the delivery.

After Byford's testimony regarding the controlled delivery, the government called Charles Wayne Goff ("Goff") to the stand. At the time of his testimony, Goff was in federal prison for violating the conditions of his supervised release that had been imposed as part of his sentence for his conviction for conspiracy to manufacture methamphetamine. Goff testified that he had been involved in dealing marijuana with Young[3] since the mid to late 1980s and that for about four years in the mid-1990s, he sold Young around 100 pounds of marijuana per month.

After a second forensic chemist identified the contents of other government exhibits as marijuana, the government called the sheriff of Dekalb County. The sheriff testified that he had worked with Foutch while she was acting as a confidential informant and identified where various controlled buys involving Roller had taken place.

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[3] Goff testified that he knew Roller but that he did not have a relationship with him "concerning marijuana." Joint Appendix ("J.A.") at 888-90 (Trial Tr. at 432-34).

Next, Kerry Nelson ("Nelson"), a former undercover narcotics officer with the Rutherford County Sheriff's Department, testified. According to Nelson, in 1998 during a sting operation, he tried to sell fifty pounds of marijuana to Pete Murray ("Murray"). Nelson explained that this sting was unsuccessful because when Murray arrived to purchase the marijuana, Murray told Nelson that they would have to go to "Jeff's" house to get the money. J.A. at 1001 (Trial Tr. at 545). Per protocol, Nelson refused to leave the planned purchase spot despite Murray's assurances that they would be safe from law enforcement because the sheriff was Jeff's cousin.

The next witness was Donna Parsley ("Parsley"), Roller's girlfriend. Under a grant of immunity, Parsley testified that she had once helped Roller count money and that Roller had told her that he had significant quantities of money buried in cans on his property.

After Parsley testified, the government called Billy Miller ("Miller"), a former investigator in Dekalb County. In 1998 or 1999, Miller placed a motion-activated camera near a marijuana patch in the woods. This camera captured an image of two men who were later identified as Roller and Young apparently cultivating the marijuana plants. Miller testified that Roller and Young were indicted based on these photographs but that their state-court trial ended in a hung jury.

Next, Ricky Estes ("Estes"), a truck driver from Woodbury, Tennessee, took the stand. Estes testified that on three or four occasions, he had helped Roller and Young strip marijuana.

Estes was followed on the stand by Kenneth Wayne Amonett ("Amonett"), another acquaintance of Roller and Young. Amonett was a regular marijuana user who had spent time in jail for marijuana-related offenses. Beginning in the late 1980s, Amonett bought increasingly large quantities of marijuana from Roller. Amonett stated that he had seen 200 pounds of marijuana in a barrel on Roller's property. Once, Amonett obtained a pound of marijuana from Young while Roller was out of town. Amonett told the jury that he had seen Roller growing marijuana and that he had helped Roller and Young strip marijuana. According to Amonett, Roller told him that Roller and Young almost had been caught when the police intercepted a truckload of marijuana intended for them.

After Amonett testified, the government called Kevin Murphy, a deputy with the Warren County Sheriff's Department, who testified regarding the search of Roller's property that was conducted when Roller was arrested. Next, Charlie Wilder, an officer with the Cannon County Sheriff's Department, testified regarding the search that was conducted after the truckload of marijuana was intercepted on Judge Purser Hill Road.

Then the government called Pete Murray ("Murray"), who testified that since the late 1980s he had been buying marijuana from Young and reselling it. When Young was out of town, Murray obtained marijuana from Roller. The bulk of Murray's testimony concerned recorded conversations between Murray and Young. After the government informed Murray that it had intercepted marijuana-related phone conversations between Murray and Young,

Murray agreed to act as a confidential informant for the government and to record his conversations with Young. The government played recordings of Murray's conversations with Young, which Murray explained to the jury.

Murray testified that he had grown marijuana and that Young had advised him in this endeavor. On occasion, Murray had helped Roller and Young strip marijuana. Murray also mentioned a man who had offered to sell Murray fifty pounds of marijuana but who had abandoned the deal when Murray insisted that they needed to go to Young's house to complete the deal. Murray's testimony also contained various implications that area law enforcement was corrupt: Young once told Murray that Cannon County law enforcement would not bother Murray and that Roller and Young were not retried after their state-court trial for growing marijuana ended in a hung jury because they had paid the DA. Moreover, Murray testified that after the truckload of marijuana was intercepted, Roller and Young feared that the Mexicans were going to come after them and switched cars often. However, Murray also testified that Young told Murray that the owner of the truckload of marijuana had apologized to Young for bringing law enforcement to Young's property.

After Murray's lengthy testimony, the government recalled Delaney, the Tennessee Bureau of Investigation case agent, who testified regarding the government's relationship with Murray. According to Delaney, an individual who "has five pounds of pot [available] for sale continuously" is involved in "upper level distribution" of marijuana. J.A. at 1377 (Trial Tr. at 921).

As the final part of its case in chief, the government read into evidence the testimony that Roller and Young had given while they were on trial in state court for charges that the state brought based on the photographs taken in the marijuana patch. At that trial, Roller and Young stated that they could not identify themselves in the photographs, but, in any event, they were not there growing or tending marijuana.

After the government closed its case, Roller called two witnesses: Billy Miller and Nell Roller, Roller's mother. Earlier in the trial, Miller had testified for the government, and Roller called him because of some confusion over Miller's exact testimony in Roller's and Young's prior state-court trial. Roller's mother testified regarding Roller's family, the fact that Roller was unable to read and write, and Roller's tendency to exaggerate. Young called one witness, John Barker, a utility-company official, who testified that the electricity subscriber at 46 Judge Purser Hill Road at the time that the marijuana was intercepted was Jaime Valdivia-Perez. In rebuttal, the government recalled Delaney, the case agent, to testify regarding Roller's and Young's tax records.

In its closing statement, the government summarized the evidence that had been presented, focusing on the testimony of individuals who had stated that they had bought marijuana from or sold marijuana to Roller and Young. The government concluded by discussing the quantities of marijuana involved in the evidence it had presented.

In closing, Roller's counsel argued that many of the government's witnesses were drug addicts and that

they were not credible. Roller's counsel admitted that Roller had sold some marijuana, but told the jury that the government had not proved that Roller had been involved with 1000 or more plants or 1000 or more kilograms. Young's counsel began his closing statement by arguing that there was not enough proof to tie Young to the intercepted truckload of marijuana. Young's counsel highlighted the fact that the government had presented little evidence beyond the memories of drug users to prove that Roller and Young had been involved in large-scale drug trafficking for many years. After a brief final closing statement by the government, the district court instructed the jury.

During deliberations, the jury sent out the following question: "On count one is it necessary for conspiracy to run from 1992-2006 to [f]ind guilty?" J.A. at 335 (Jury Communication). The district court responded as follows: "To find a defendant guilty on Count One, you must find that there was a conspiracy that began 'in or about' 1992 and lasted to 'in or about' May 2006. However, to find a defendant guilty on Count One you are not required to find that a defendant was a member of the conspiracy from the beginning of the conspiracy." J.A. at 336 (Judge Communication). Following deliberations, the jury found Roller and Young guilty of a conspiracy involving at least 100 but less than 1000 marijuana plants and kilograms of marijuana. The jury found Roller guilty of counts two through five, counts seven through twelve, and counts sixteen, seventeen, and twenty. The jury found Young guilty of counts six, thirteen through fifteen, eighteen, and nineteen.

After the verdict, the district court sentenced Roller and Young. Roller's counsel objected to the amount of

marijuana listed in the presentence report and argued that because the jury had found Roller guilty of a conspiracy involving at least 100 but less than 1000 kilograms of marijuana, Roller should not be sentenced based on a higher quantity of marijuana. After hearing arguments by counsel, the district court determined the government had shown to a preponderance of the evidence that the intercepted truckload of marijuana belonged to Roller and Young. Although this truckload contained 2318 pounds of marijuana and was sufficient to put Roller and Young over the 1000 kilogram (or 2200 pound) threshold alleged by the government, the district court also found that Roller been involved with the 11 pounds of marijuana found at his house, the 15 pounds he sold to Foutch, and 400 pounds as an estimate of what he would have received from one trip to Mexico. The district court found that Roller had been involved with 2744 pounds of marijuana, enough to merit the base offense level of 32 requested by the government.

The district court decided that it was improper to impose a sentencing enhancement for possessing a dangerous weapon. The district court also found that it was improper to add two levels for obstruction of justice, despite possible perjury in a previous state trial, because Roller had not lied before the district court. Because Roller had gone to trial to contest the amount of marijuana involved, the district court declined a sentence reduction for acceptance of responsibility. The district court concluded that a leadership enhancement was proper because Roller and Young were partners who hired people to help them strip marijuana.

After making these determinations, the district court concluded that Roller's Guidelines range was 188 to 235 months of imprisonment, as determined by his offense level of 36 and his criminal history category of I. The district court sentenced Roller to a total of 200 months of imprisonment, 4 years of supervised release, and a fine of $10,000.

As it had with Roller, the district court concluded that the presentence report appropriately based Young's sentence on his involvement with a conspiracy involving more than 1000 kilograms of marijuana. Specifically, the district court found that the government had proved to a preponderance that Young was involved with the 2318-pound intercepted truckload of marijuana. Additionally, the district court found that Young had sold at least 530 pounds of marijuana to Murray and that "the testimony of Mr. Goff would certainly put the quantity well in excess of 2200 pounds." J.A. at 1620 (Sent'g Tr. at 67). The district court next concluded that it was proper to enhance Young's sentence by four levels because of his leadership role in the conspiracy. Despite his prior convictions, the district court declined to sentence Young as a career offender.

The district court placed Young in the same Guidelines range as Roller: 188 to 235 months of imprisonment based on an offense level of 36 and a criminal history category of I. The district court sentenced Young to 224 months of incarceration, eight years of supervised release, and a $15,000 fine.

On appeal, Roller and Young raise four issues in common alleging that: (1) the district court erroneously admitted hearsay; (2) the district court

erred when it applied a leadership-role sentencing enhancement; (3) the district court erred in considering acquitted conduct in sentencing; and (4) their sentences were procedurally and substantively unreasonable. Young also argues that the district court erred when it admitted statements by Roller regarding the use of force to collect drug-related debts. Roller asserts that the district court's response to the jury's question regarding the duration of the conspiracy was prejudicial error. We have jurisdiction to review this appeal of the district court's final judgment pursuant to 28 U.S.C. § 1291. Jurisdiction to review the sentences imposed by the district court is provided by 18 U.S.C. § 3742.

II. ANALYSIS

A. Hearsay

1. Coconspirators' Statements

Roller and Young appeal the district court's decision to admit certain testimony as nonhearsay statements by coconspirators made "during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). In order for a statement to be admitted under Rule 801(d)(2)(E), the offering party must prove by a preponderance that "'the conspiracy existed, that the defendant was a member of the conspiracy, and that the co-conspirator's statements were made "in furtherance of the conspiracy."'" *United States v. Payne*, 437 F.3d 540, 544 (6th Cir. 2006) (quoting *United States v. Gessa*, 971 F.2d 1257, 1261 (6th Cir. 1992) (en banc)). The district court can consider the contents of the statement in making this determination, but the statements "must be

corroborated by independent evidence." *Id.* "'In reviewing a trial court's evidentiary determinations, this court reviews de novo the court's conclusions of law, e.g., the decision that certain evidence constitutes hearsay, and reviews for clear error the court's factual determinations that underpin its legal conclusions.'" *Id.* (quoting *United States v. McDaniel*, 398 F.3d 540, 544 (6th Cir. 2005)).

Roller and Young appeal the district court's decision to admit under Rule 801(2)(d)(E) statements made by White and Stewart to Foutch. Foutch testified that she attempted to collect money that White and Stewart owed Roller. The government sought to introduce tapes of conversations that Foutch had with White and Stewart. At the time of Foutch's testimony, the district court conditionally admitted the conversations under Rule 801(2)(d)(E). Young also appeals the district court's decision to allow Nelson, an undercover officer, to testify that while Nelson was trying to sell Murray marijuana as part of a sting operation, Murray told Nelson that they would have to go to "Jeff's" house to get the money necessary to complete the deal.

At the conclusion of the government's case, the district court found that the statements had been admitted properly under 801(d)(2)(E) and reasoned as follows:

> [T]he first objection under 801(d)(2)(E) that I noted was a statement by Jimmy White on Page 24 and 25 of the Foutch transcript where he says, that you know, among other things that, yeah, we have done some, talking about he and, I guess, Mr. Roller, they've done some stuff and

traded around, and, no, it wasn't cows. And they're talking about him owing money to Mr. Roller. And I think that the evidence in the case due to the basic quantities involved here, in fact, and the fact that Roller apparently fronted marijuana to Mr. White, I think that it's fair to say that Mr. White was not just a purchaser, Mr. White was a dealer, and was just one cog in the chain here of distribution. And so, I think that these statements about him owing money to Mr. Roller are statements made in furtherance of the conspiracy. So, I do find that, number one, the conspiracy existed by a preponderance of the evidence. Second, that Mr. Roller was a member of it, and as well as Mr. Young. And that these statements by Mr. White were made in furtherance of the conspiracy. So, the objection to those statements are respectfully overruled.

The next note that I have here, . . . February 2nd, 2004, phone call with Kenny Stewart. I think it's Pages 41 and 42 of the Foutch transcript. Again, you know, Stewart is begging off on the paying right away, he says it's a bit slow. It's another one of these conversations about paying Mr. Roller. Again, I think that Mr. Stewart was in addition to being a purchaser from Mr. Roller, a distributor, for the same reasons that Mr. White was. And so, I find, number one, that a conspiracy did exist. Number two, that each defendant was a member of that conspiracy. Finally, that Mr. Stewart's comments and discussion with Mrs. Foutch here were in furtherance of the conspiracy.

Next, the note I had, next note I had was March 12th, 2004, another Kenny Stewart conversation regarding paying Mr. Roller. I think it's Pages 48 through 50 of the transcript. I don't know if it's true or not, but Stewart talks about getting ripped off by some people, but, anyway, again, we're talking about why, why he can't pay, why he's having difficulty in paying Mr. Roller. . . . [F]or the same reasons, we're talking about making drug payments to Mr. Roller. And, of course, as a part of, as a part of this conspiracy and in furtherance of the conspiracy. And, of course, Mr. Roller wouldn't be distributing drugs to Mr. Stewart if he wasn't getting paid. And so, I find that the conspiracy did exist. And that Mr. Roller, as well as Mr. Young were members of it. And that these statements were made in furtherance of the conspiracy.

Finally, my final note was statements by Mr. Murray to Sergeant Nelson . . . about bringing pot to Jeff where the money would be waiting.

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[Murray said] he would have to go back to Jeff to check because Jeff had the money and so forth. Well, that clearly, that clearly was in furtherance of the conspiracy. It never did come to a fruition, I guess because the deal didn't go down, but let's put it this way, that Mr. Murray at this time was acting in furtherance of the conspiracy because he was trying to get some marijuana at a time when the supply, I guess, was a little short, as I recall.

But, again, I find specifically that a conspiracy did exist and that being the conspiracy alleged in Count 1. That both

> defendants were members of it, including Mr. Young in this particular case. And that the statements made according to the undercover, then undercover agent quoting Mr. Murray, those statements by Mr. Murray were made in furtherance of the conspiracy.

J.A. at 1407-10 (Trial Tr. at 951-54).

On appeal, Young asserts that these statements show only a buyer-seller relationship, and that such a relationship is insufficient to establish a conspiracy.[4] Roller and Young argue that the statements in question were not made during the course and in furtherance of the conspiracy. We review for clear error the district court's factual findings that there was a conspiracy, that Roller and Young were a part of it, and that the statements in question were made during the course and in furtherance of it. *Gessa*, 971 F.2d at 1261. Especially in light of the extensive testimony regarding marijuana sales and cultivation, we conclude that it was not clear error for the district court to determine, at the end of the government's case, that the government had proven to a preponderance that Roller and Young were members of a conspiracy.

Roller and Young's argument that the government had not sufficiently proved that White and Stewart were coconspirators raises a closer question. Roller and Young correctly note that we have held that a

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[4] Roller admits that there was enough evidence for the district court to find by a preponderance that there was a conspiracy of which Roller was a member.

"'buyer-seller relationship' is not enough to make someone a participant in a drug conspiracy, 'further evidence indicating knowledge of and participation in the conspiracy can be enough to link the defendant to the conspiracy.'" *United States v. Henley*, 360 F.3d 509, 514 (6th Cir. 2004) (quoting *United States v. Gibbs*, 182 F.3d 408, 421 (6th Cir. 1999)). However, we have also held that "the 'trust' involved in 'fronting' drugs under a delayed payment or credit arrangement, 'suggests more than a buyer-seller arrangement between the parties.'" *Id.* (quoting *United States v. Humphrey*, 287 F.3d 422, 435 (6th Cir. 2002), *overruled on other grounds, United States v. Leachman*, 309 F.3d 377 (6th Cir. 2002)). Additionally, we have held that the involvement of a large quantity of drugs can "create[] an inference of a conspiracy." *United States v. Bourjaily*, 781 F.2d 539, 545 (6th Cir. 1986).

Although it is a close question, we conclude that the district court did not commit clear error in finding that White and Stewart were coconspirators and that the statements in question were made in furtherance of the conspiracy. As the district court noted, both men owed Roller significant sums of money, indicating that Roller had fronted them drugs and that the quantities involved were not minimal. Additionally, receiving payment due is a critical portion of any conspiracy to sell narcotics. Similarly, the district court's conclusion that Murray was a coconspirator was not clearly erroneous; Murray made the statement in question during an attempt to purchase a large quantity of marijuana, the statement named Young, and Murray later admitted extensive marijuana-related involvement with Young. We review de novo the district court's determination that these "facts warrant

the legal conclusion under Rule 801(d)(2)(E) that the statements are admissible." *United States v. Rogers*, 118 F.3d 466, 477 (6th Cir. 1997). Given the evidence that larger quantities, repeat sales, and fronting were involved, the district court did not err in admitting the statements in question as nonhearsay coconspirator statements.

Additionally, even assuming that the district court erred in admitting White, Stewart, and/or Murray's statements under Rule 801(d)(2)(E), we conclude that any error was harmless. Fed. R. Crim. P. 52(a). "The erroneous admission of a statement by an unindicted co-conspirator constitutes harmless error when sufficient other evidence demonstrates a defendant's active involvement in the conspiracy." *Rogers*, 118 F.3d at 478; *see also United States v. Conrad*, 507 F.3d 424, 431 (6th Cir. 2007) (applying *Rogers* test and finding other evidence insufficient). White's and Stewart's statements were only a small part of Foutch's testimony, and other witnesses such as Foutch, Murray, and Amonett testified that they had bought, sold, and prepared large quantities of marijuana with Roller and Young. Given this volume of evidence relating to a marijuana-based conspiracy, we must conclude that any error in admitting these statements was harmless.

2. Holt's Statements

Roller objects to the introduction of recorded statements that Holt made to Foutch. When Foutch tried to collect money from Holt for Roller, Holt used profanity, threatened Foutch, and hit Foutch in the side of the head with a hammer. The district court admitted these statements as nonhearsay introduced

for context despite counsel's objection that the statements were unfairly prejudicial. On appeal, Roller argues that these statements should not have been admitted because their unfair prejudicial effect outweighed their probative value.[5] Fed. R. Evid. 403.

"'In reviewing the trial court's [Rule 403] decision for an abuse of discretion, the appellate court must view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.'" *United States v. Jackson*, 473 U.S. 660, 668 (6th Cir. 2007) (quoting *United States v. Moore*, 917 F.2d 215, 233 (6th Cir. 1990), *cert. denied*, 499 U.S. 963 (1991)). Applying this deferential standard, we conclude that the district court did not abuse its discretion. Although Holt did use strong language, Foutch had already testified that Holt hit Foutch in the head with a hammer. It seems unlikely that, given this context, Holt's language would have caused substantial unfair prejudice. Additionally, Holt's statements did provide background on the conversation that resulted in Foutch being hit with a hammer. Even assuming that the district court erred, we conclude that the error is harmless because the language does not produce as much prejudice as the hammer attack itself, which is unchallenged.

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[5] Roller does not appear to argue that the statements were improperly determined to be nonhearsay. Roller Br. at 34.

B. Statements Regarding Use of Force[6]

Young argues that the district erred when it allowed the government to "present testimony that co-defendant Roller obtained [sic] drug debts by force or threat of physical violence" without even a limiting instruction.[7] Young Br. at 23. Young asserts that the "evidence that co-defendant Roller used extortion to obtain [sic] drug debts is minimally probative, if at all, as to Defendant Young's participation in the conspiracy. No evidence was presented to connect Defendant Young in any way to his co-defendant's actions in collecting debts." *Id.* at 25. Young argues that the introduction of this testimony was unfairly prejudicial in violation of Rule 403.

As discussed above, "[i]n reviewing the trial court's [Rule 403] decision for an abuse of discretion, the appellate court must view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum

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[6] Roller does not raise this argument on appeal.

[7] In the last sentence of the section of his brief dealing with this issue, Young argues that the district court should have severed the trials. Young makes no argument specifically relating to severance, instead focusing on the prejudicial quality of the admitted evidence. The government asserts that this severance argument is unpreserved and subject to plain-error review. Even if Young preserved the severance argument, in order to prevail Young must "show 'compelling, specific, and actual prejudice from [the] court's refusal to grant the motion to sever.'" *United States v. Driver*, 535 F.3d 424, 427 (6th Cir. 2008) (quoting *United States v. Saadey*, 393 F.3d 669, 678 (6th Cir. 2005)). Young's brief mention of severance does not meet this high standard, and reversal on this ground is inappropriate.

reasonable prejudicial value." *Jackson*, 473 U.S. at 668 (internal quotation marks omitted). Young incorrectly asserts that no evidence connected him to Roller's attempts to collect debts. Foutch testified that Roller and Young were present when Roller asked her to collect money from drug debtors and that Young told her to take the title to Holt's car if Foutch was unable to get money from Holt. The government's theory was that Roller and Young were partners in an extensive drug conspiracy. Although the information relating to debt collection was largely based on Foutch's conversations with Roller, the overall evidence in the case does not suggest that Young was distanced from the debt-collecting segment of the conspiracy. Additionally, the testimony regarding debt collection had probative value insofar as it showed that Roller and Young were willing to extend credit to drug purchasers.

Even assuming that the district court erred as to Young in admitting testimony regarding debt collection, we conclude that this error was harmless. Roller and Young did not face any extortion charges or any charges involving violence. There was ample other evidence of a conspiracy between Roller and Young, including testimony regarding stripping marijuana and detailed testimony from individuals who had been involved in dealing drugs with Roller and Young for many years. Therefore, we reject Young's argument that admission of statements regarding debt collection constituted reversible error.

C. District Court's Response to Jury Question Regarding Conspiracy Duration[8]

During deliberations, the jury sent out the following question for the court: "On count one is it necessary for conspiracy to run from 1992-2006 to [f]ind guilty?" J.A. at 335 (Jury Communication). Over objections by Roller's and Young's counsel, the district court gave the following answer: "To find a defendant guilty on Count One, you must find that there was a conspiracy that began 'in or about' 1992 and lasted to 'in or about' May 2006. However, to find a defendant guilty on Count One you are not required to find that a defendant was a member of the conspiracy from the beginning of the conspiracy." J.A. at 336 (Judge Communication).

Roller argues that the second sentence of the judge's answer was unfairly prejudicial because it reemphasized a portion of the jury charge that the jurors had not asked about. Roller does not suggest that the answer misstated the law. Instead, Roller asserts that the jury asked only about the span of the conspiracy and that the court's inclusion of a statement that conviction did not require a finding that each individual had been a member of the conspiracy from the beginning was not responsive. Accordingly, Roller argues, this non-responsive portion of the district court's answer would have "suggested to the jury that the part of the charge reflected in the second sentence of the court's response was what was important and that the jury should focus on that." Roller Br. at 36.

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[8] Young does not raise this argument on appeal.

"'The district court's actions in responding to questions from the jury are reviewed for abuse of discretion.'" *United States v. Khalil*, 279 F.3d 358, 367 (6th Cir. 2002) (quoting *United States v. August*, 984 F.2d 705, 712 (6th Cir. 1992)). There is a "'high standard for reversal of a conviction on the grounds of improper instructions.'" *Id.* (quoting *United States v. Sheffey*, 57 F.3d 1419, 1429 (6th Cir. 1995), *cert. denied*, 516 U.S. 1065 (1996)). Under this high standard, an appellate court "'may reverse a judgment only if the instructions, viewed as a whole, were confusing, misleading and prejudicial.'" *Id.* (quoting *United States v. Clark*, 988 F.2d 1459, 1468 (6th Cir.), *cert. denied*, 510 U.S. 832 (1993)).

We cannot conclude that the district court abused its discretion. In its initial jury charge, the district court stated that a conspiracy conviction "does not require proof that the defendant knew everything about the conspiracy, or everyone else involved, *or that he was a member of it from the very beginning*." J.A. at 126 (Jury Charge at 25) (emphasis added). This language follows Sixth Circuit Pattern Jury Instruction § 3.03(2). The district court's response to the jury's question reiterated the correct legal standard that had already been presented to the jury. Although the district court's response may have gone beyond the scope of the jury's question, Roller has not shown that the district court abused its discretion in doing so. Because we cannot conclude that the district court abused its discretion, we deny Roller relief on this ground.

D. Use of Acquitted Conduct Regarding Drug Amount in Sentencing

Roller and Young were indicted for a conspiracy to manufacture 1000 or more marijuana plants and to distribute 1000 or more kilograms of a substance containing marijuana. At trial, the jury found Roller and Young guilty of conspiracy, but determined that the conspiracy did not involve 1000 or more marijuana plants or 1000 or more kilograms of marijuana. Instead, the jury convicted Roller and Young of a conspiracy involving at least 100 but less than 1000 marijuana plants and at least 100 but less than 1000 kilograms of marijuana. Although the jury thereby acquitted Roller and Young of a conspiracy involving the larger quantity of marijuana, the district court sentenced Roller and Young based on the larger amount. Roller and Young argue that their sentences were impermissibly based on this higher amount of which the jury had acquitted them.

In a factually similar case where the defendant was sentenced based on a quantity of drugs of which the jury had acquitted him, a panel of this court held that "a post-*Booker* sentencing court may consider even 'acquitted conduct' if it finds facts supporting that conduct by a preponderance of the evidence." *United States v. Mendez*, 498 F.3d 423, 427 (6th Cir. 2007). In another case involving acquitted conduct subsequently heard by this court en banc, a majority of the judges of this circuit concluded that a district court may use acquitted conduct that it finds to a preponderance to enhance a defendant's sentence "so long as the resulting sentence does not exceed the

jury-authorized United States Code maximums."[9] *United States v. White*, --- F.3d ---, 2008 WL 5396246, at *1 (6th Cir. 2008) (en banc).

Given this holding by the en banc majority, we must reject Roller's and Young's arguments that acquitted conduct cannot be used to enhance their sentences. However, we still must review the district court's decision to evaluate whether the acquitted quantity was proven by a preponderance. "A district court's determination of the quantity of drugs used to compute a defendant's sentence is a finding of fact that should be upheld unless clearly erroneous. The district court's finding must be supported by a preponderance of the evidence." *United States v. Hoskins*, 173 F.3d 351, 354 (6th Cir. 1999) (citation omitted). The inclusion of a drug quantity that has not been proven by a preponderance constitutes clear error. *See, e.g., Gibbs*, 182 F.3d at 440-45 (analyzing in detail findings underlying district court's determination of drug quantity).

At sentencing, the district court specifically addressed the question of drug quantity. The district court found 2744 pounds[10] attributable to Roller: eleven pounds that was found in his freezer, fifteen pounds that he sold to Foutch, 400 pounds as an estimated quantity that would be recovered on one trip to Mexico, and the 2318 pounds that was found in the intercepted truck. With respect to Young, the district

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[9] Because the maximum sentence for Count One alone is forty years, Roller's and Young's sentences do not violate this limitation on sentence length. 21 U.S.C. § 841(b)(1)(B)(vii).

[10] One thousand kilograms is equivalent to 2200 pounds.

court was less precise, but it specifically attributed to Young the 2318 pounds from the intercepted truck and 530 pounds as an estimate of what Young had sold to Murray over the course of 15 years.[11] These findings attribute 2848 pounds of marijuana to Young. If the district court had not found to a preponderance that the intercepted truckload was connected to Roller and Young, Roller and Young could have been sentenced only in accordance with the jury finding that the conspiracy involved at least 100 but less than 1000 kilograms of marijuana. Because the other quantities found by the district court were either admitted by Roller and Young or fell within the quantity range authorized by the jury verdict, our analysis focuses on the district court's determination that there was sufficient evidence connecting Roller and Young to the intercepted truckload of marijuana.

Although it is an extremely close question, we conclude that it was not clear error for the district court to conclude that the government had shown, to a preponderance, that the intercepted truckload of marijuana was attributable to Roller and Young. The district court based its findings on the fact that the

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[11] The district court also mentioned that "the testimony of Mr. Goff would certainly put the quantity well in excess of 2200 pounds," but the district court did not make any specific findings regarding the quantity involved, nor did it explain whether this quantity alone would rise to the 1000 kilogram threshold or if it would do so only in conjunction with the intercepted truckload. J.A. at 1620 (Sent'g Tr. at 67). Given this lack of information and the specificity of the district court's other quantity-related findings, we conclude that the district court did not include a specific amount based on Goff's testimony. Therefore, we do not consider this quantity of drugs when reviewing the district court's sentencing determination.

marijuana was sent to Roller and Young's property,[12] that Roller and Young obtained marijuana from Mexico, that there was a truck resembling Young's in the area on the day of the delivery, and that Roller and Young changed cars frequently because they were afraid that "the Mexicans were going to come after them." J.A. at 1568-69 (Sent'g Tr. at 15-16). There is, however, conflicting evidence that the district court did not mention. First, there was evidence that one of the individuals who was arrested at the scene of the delivery, Jaime Valdivia-Perez, was occupying the property at that time. Second, there was testimony that the owner of the truckload of marijuana had apologized to Young for drawing law enforcement to Young's property. Finally, there was little, if any, other evidence that Roller and Young dealt in quantities of marijuana as large as that found in the intercepted truck.

This circuit has held that the district court cannot assume that any drugs in a given area belong to defendants who are major drug dealers in that area. *Hoskins*, 173 F.3d at 356-57 ("The reasoning of the district court implies that because [the defendants] were two top dealers in the area, any marijuana grown

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[12] On appeal, Roller asserts that the property in question was owned by Young alone. Balsamo's testimony that Young stated that Young owned the property supports Roller's assertion. However, at his sentencing hearing, Roller failed to object to the district court's statement that the property "belonged to, partly to Mr. Roller, and, of course, Mr. Young, as well." J.A. at 1568 (Sent'g Tr. at 15). Additionally, given the fact that the jury convicted Roller and Young of being coconspirators in a conspiracy to distribute marijuana, the exact ownership of the property is not critical.

and sold in the area was attributable to each of them. We believe the sentencing guidelines require a more particularized finding."). In this case, however, the district court made particularized findings related to evidence presented at trial and did not rely on an assumption that because Roller and Young were large-scale drug dealers in the area, the truckload of marijuana must have been theirs. Although the question of whether the government proved to a preponderance that the truckload was attributable to Roller and Young is a close one, we conclude that the district court did not clearly err when it concluded that the government had done so.[13] Were we reviewing the evidence ourselves, under a preponderance of the evidence standard, we might reach a different result, but we cannot conclude that the district court's findings constituted clear error.

E. Leadership-Role Enhancement

At sentencing, the district court found that Roller and Young each played a leadership role in a conspiracy that involved five or more participants. The district court therefore applied a four-level

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[13] We note that even if the intercepted truckload of marijuana is eliminated from consideration, during sentencing the district court did not exhaustively consider all of the quantities of marijuana which had been presented at trial. For example, the district court did not determine the amount of marijuana that was stripped or grown by Roller, Young, and the individuals they hired. Nor did the district court decide the amounts that had been sold to or bought from every individual who testified. Because the district court did not find any of these quantities to a preponderance, we do not consider whether these quantities, apart from the truckload of marijuana, could justify the district court's sentencing determination.

enhancement to Roller's and Young's base-offense levels pursuant to United States Sentencing Guidelines § 3B1.1(a). There is confusion within this circuit concerning the standard of review that should be applied to a district court's decision to impose a leadership enhancement under § 3B1.1. *See United States v. Walls*, 546 F.3d 728, 734 (6th Cir. 2008). "When reviewing § 3B1.1(a) impositions in the past, 'we reviewed the district court's factual findings for clear error and its legal conclusions de novo.'" *Id.* (quoting *United States v. McDaniel*, 398 F.3d 540, 551 n.10 (6th Cir. 2005)). "However, in 2001, 'the Supreme Court ruled in *Buford v. United States* that, in light of the fact-bound nature of the legal decision, an appellate court should review deferentially, rather than de novo, a district court's application of U.S.S.G. § 4B1.2.'" *Id.* (quoting *McDaniel*, 398 F.3d at 551 n.10). Some cases in this circuit suggest, without discussing *Buford*, that "'[a] district court's determination regarding a defendant's role in the offense is reversible only if clearly erroneous.'" *United States v. Jeross*, 521 F.3d 562, 579 (6th Cir. 2008) (quoting *United States v. Gates*, 461 F.3d 703, 709 (6th Cir.), *cert. denied*, 127 S. Ct. 602 (2006)). Other cases state that "[w]e have not settled the question of what standard governs review of a sentencing enhancement under U.S.S.G. § 3B1.1." *United States v. Moncivais*, 492 F.3d 652, 660 (6th Cir. 2007).

Under either standard of review, clear error or de novo, we conclude that Roller's and Young's arguments fail. During Roller's sentencing hearing, the district court found that the role enhancement was proper because "[t]here was ample testimony during the course of the trial that the defendant was an organizer and leader of criminal activity that involved five or

more participants." J.A. at 1593 (Sent'g Tr. at 40). The district court determined that Roller and Young were partners and noted that the marijuana-stripping operations involved more than five participants and that Roller had "boys from the mountain" to help collect his debts. J.A. at 1593-94 (Sent'g Tr. at 40-41). With respect to Young, the district court noted that many people were involved in stripping marijuana and in transporting marijuana from Mexico. The district court also stated that "even if you don't have five people, which I think you do, . . . it could still be otherwise extensive for the four levels." J.A. at 1624-25 (Sent'g Tr. at 71-72).

"Regardless of the exact parameters of 3B1.1(a) review in light of *Buford*, it is clear that factual findings made by the district court are reviewed for clear error." *Walls*, 546 F.3d at 735. The evidence presented at trial supports the district court's determination that more than five people were involved in Roller's and Young's periodic marijuana-stripping endeavors. Even reviewing de novo the district court's conclusion that a four-point leadership enhancement was proper, we conclude that reversal is unwarranted. The evidence at trial showed that Roller and Young were involved with a large quantity of marijuana over the course of years; they bought, sold, cultivated, and manufactured marijuana, and much of this activity took place on and around their own property. Additionally, more than one witness testified regarding Roller's and Young's marijuana-stripping operations. By its nature, this work was seasonal, but Roller and Young repeatedly and regularly hired more than five individuals to perform this task for them. We conclude that under either clear-error or de novo review, the district court's

decision to impose this sentencing enhancement should not be overturned.

F. Unreasonableness of Sentences

On appeal, Roller and Young argue that their sentences are unreasonable.[14] We review sentences for reasonableness under the standard the Supreme Court

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[14] In a footnote in its appellate brief, the government argues that because Roller and Young failed to raise "unreasonableness before the district court," we should review their sentencing claims for plain error. Gov't Br. at 52 n.5. However, this circuit's rule that plain-error review applies when we evaluate the sentence of a defendant who failed to object to the sentencing procedure after the sentence was imposed does not bar Roller's or Young's claims. *See United States v. Vonner*, 516 F.3d 382, 385-86 (6th Cir. 2008) (en banc). This rule does not bar Roller's claims of procedural unreasonableness because after the district court imposed its sentence, the district court failed to ask Roller if he had any objections. The government admits that the district court did not make this inquiry, but asserts that Roller and his counsel left the courtroom before the district court had a chance to ask. This argument is belied by the transcript which shows that Roller's counsel and the district court spoke about sentencing details before Roller left and that the district court gave Roller permission to leave. Because he was not asked if he objected to his sentence, Roller's claims of procedural unreasonableness are not subject to plain-error review. *Vonner*, 516 F.3d at 385-86.

Young makes one argument regarding the reasonableness of his sentence—that his sentence was unreasonable because it is "greater than that necessary to comply with the purposes of 18 U.S.C. § 3553(a)(2)." Young Br. at 36. We have held that "[a] litigant has no duty to object to the 'reasonableness' of the length of a sentence (or to the presumption of reasonableness) *during* a sentencing hearing." *Vonner*, 516 F.3d at 389. Accordingly, neither Roller nor Young was required to object after the district court imposed its sentences in order to preserve claims of substantive unreasonableness.

described in *Gall v. United States*, 128 S. Ct. 586, 597 (2007):

> Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a

different sentence was appropriate is insufficient to justify reversal of the district court.

Under this standard, reasonableness review has two components: procedural and substantive.

1. Review for Procedural Reasonableness

Review for procedural reasonableness is a three-step inquiry. An appellate court must determine whether the district court: "(1) properly calculated the applicable advisory Guidelines range; (2) considered the other § 3553(a) factors as well as the parties' arguments for a sentence outside the Guidelines range; and (3) adequately articulated its reasoning for imposing the particular sentence chosen, including any rejection of the parties' arguments for an outside-Guidelines sentence and any decision to deviate from the advisory Guidelines range." *United States v. Bolds*, 511 F.3d 568, 581 (6th Cir. 2007).

Roller argues that his sentence was procedurally unreasonable and that the district court improperly calculated the Guidelines range because the district court considered acquitted conduct in determining the base offense level and erroneously applied a four-level leadership enhancement.[15] Roller also asserts that the district court impermissibly considered the role of public corruption in the conspiracy (which, Roller argues, was only attributed to Young). Roller further

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[15] We rejected above Roller's claims that the leadership enhancement and the district court's use of acquitted conduct were improper, and we will not reconsider them here.

argues that the district court impermissibly considered that Roller would have had a criminal record but for the fact that the jury in Roller's state trial failed to reach a verdict.

We conclude that the district court did not abuse its discretion by considering improper factors. The district court mentioned public corruption, but it did so in the context of considering how Roller's sentence would "promote respect for the law," one of the factors a court must consider when imposing a sentence. J.A. at 1607 (Sent'g Tr. at 54); 18 U.S.C. 3553(a)(2)(A). Immediately before the district court mentioned the fact that Roller had "escaped judgment in the state court," the district court also stated that Roller's lack of a criminal history was "a favorable factor." J.A. at 1608 (Sent'g Tr. at 55). In this context, it does not seem that the district court used Roller's prior brush with the law against him or that the district court abused its discretion by mentioning this prior trial.

The district court's sentencing decisions relating to Roller (as well as Young) specifically mentioned the § 3553(a) factors that led the district court to select their sentences. The district court's sentencing decisions referenced specific evidence from trial and the § 3553(a) factors that it found critical. The district court also specifically mentioned the mitigating evidence that Roller had presented, and noted that it believed that Roller had a good side that had been overshadowed by his bad role in a drug conspiracy. Given the district judge's explanations for the sentences it imposed and the deferential standard of review, we conclude that the district judge did not commit any significant errors and that Roller's

sentence should not be overturned for procedural unreasonableness.

2. Review for Substantive Reasonableness

Because we conclude that Roller's and Young's sentences are procedurally reasonable, we must consider the substantive reasonableness of their sentences. *Bolds*, 511 F.3d at 581. This court has held that sentences that fall within the Guidelines are presumed to be reasonable. *Vonner*, 516 F.3d at 389-90. This presumption is rebuttable, but an appellate court should not overturn a sentence just because it believes that another sentence would be appropriate. *Id.*; *see also Gall*, 128 S. Ct. at 597. Roller's and Young's sentences fall within the Guidelines range of 188 to 235 months and thus are rebuttably presumed to be substantively reasonable.

Roller argues that his sentence is substantively unreasonable for three reasons: "(1) the district court failed to accord the proper weight to mitigating evidence under § 3553(a), (2) imposed a sentence that was greater than necessary, and (3) failed to avoid unwarranted sentencing similarities [sic] between the defendant and his co-defendant's sentences or sentencing disparities with other defendants." Roller Br. at 55. Young joins Roller in the first two arguments, asserting that his sentence "is greater than that necessary to comply with the purposes of § 3553(a)(2) and does not adequately take account of [Young's] history and characteristics." Young Br. at 36.

Because the district court sentenced Roller and Young within the Guidelines, their sentences are

presumed reasonable. We conclude that Roller and Young have not rebutted this presumption. Roller and Young did present mitigating evidence in the form of numerous letters from family and community members. Although the district court did not conclude that a sentence reduction was appropriate based on these letters, it specifically considered the letters before imposing Roller's and Young's sentences. The district court also enumerated the specific evidence and the § 3553(a) factors that led it to believe that the sentences it imposed were appropriate. Given the deferential standard of review, we decline to reverse Roller's and Young's sentences.

As to Roller's argument that his sentence was disproportionate when compared with Young's, we note that Roller and Young were sentenced within the same Guidelines range because the district court determined that Young's prior convictions did not increase his criminal history level for Guidelines purposes.[16] The district court specifically stated that because of these convictions, Young merited a higher sentence within that Guidelines range, and the district court sentenced Young to two additional years of incarceration and four additional years of supervised

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[16] Roller also asserts that his sentence is unreasonable when compared with other defendants convicted of the same type of offense. Roller Br. at 58. However, as Roller admits, he raises this issue for the first time on appeal, and we therefore review his claim for plain error. *Id.*; *United States v. Blackie*, — F.3d —, 2008 WL 4949909, at *3 (6th Cir. 2008) ("Because [the defendant] did not object to his sentence based on a potential disparity, . . . we now review [that] claim[] for plain error."). Roller's brief mention of this argument does not suffice to show that the district court committed plain error in imposing Roller's sentence.

release. Given this explanation and the fact that the district court did not ignore the difference in prior criminal convictions, we cannot conclude that the district court abused its discretion by imposing a substantively unreasonable sentence on Roller. Accordingly, we **AFFIRM** the sentences imposed by the district court.

III. CONCLUSION

For the reasons discussed above, we **AFFIRM** Roller's and Young's convictions and sentences.

CONCURRING IN PART AND DISSENTING IN PART

MERRITT, Circuit Judge, concurring in part and dissenting in part. The two first offenders here grew and distributed marijuana off and on over several years and were sentenced to 17 years and 19 years respectively. In my view this sentence is too long and serves no rational penal purpose. It is much greater than necessary to adequately deter marijuana growing and distribution. I would reverse and remand for a further explanation of why such a long sentence is justified, especially in light of the great disparity in sentencing for such relatively minor marijuana crimes between the state and federal courts and among federal judges themselves. These defendants will be over 70 years old when they get out of jail, if they live that long. The cost of their incarceration, including

health care, will be enormous. The sentences seem irrational to me — too irrational for me to defer.[17]

For reasons stated in my dissenting opinion in *United States v. White*, No. 056596 (6th Cir. Dec. 24, 2008 (en banc)), I do not agree with the holdings and reasonings of Sections II.D and II.E of the majority opinion upholding the use of acquitted conduct and the judge-found, offense-conduct facts regarding the leadership enhancement. These sentencing enhancements are unconstitutional in my view. Although I concur that we must defer to the majority opinion in *United States v. White*, it is not final for all purposes and is likely to be reversed by the Supreme Court. These two enhancements are the basis for the long sentences and are inconsistent with the right of trial by jury under the Sixth Amendment, as I explained in *White*. Counsel for the defendants should keep the cases open until we find out what happens to the *White* case in the Supreme Court.

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[17] The just-released "Overview" of the U.S. Sentencing Commission for 2007 shows that "the average punishment for drug crimes ranged from a high of . . . 40 months for marijuana offenders (with a median of 24 months)." The great disparity for the marijuana offenders in this case and in the normal case remains unexplained in the record.

APPENDIX B

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

Case Number: 4:06-CR-14-001

[Dated May 15, 2007]

UNITED STATES OF AMERICA)
)
v.)
)
MORRIS ROLLER)
)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or
After November 1, 1987)

Gerald H. Summers
Defendant's Attorney

THE DEFENDANT:

* * *

[✓] was found guilty on count(s) One, Two through Five, Seven Through Twelve, Sixteen, Seventeen and Twenty of the Superseding Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
See next page.			

The defendant is sentenced as provided in pages 2 through 7 of this judgment and the Statement of Reasons. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. §3553.

* * *

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

5/7/2007
Date of Imposition of Judgment

/s/ R. Allan Edgar
Signature of Judicial Officer

R. ALLAN EDGAR, United States District Judge
Name & Title of Judicial Officer

May 15, 2007
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 846 and 841(b)(1)(B)	Conspiracy to Distribute 100 Kilograms or More of Marijuana	5/24/06	One
21 U.S.C. § 841(a)(1) and (b)(1)(D)	Distribution of Marijuana	1/19/04, 1/30/04, 2/18/04, 7/21/04, 9/15/04, 11/17/04, 3/2/05, 12/29/05, 5/24/06	Two-Five, Seven-Nine, Seventeen and Twenty
21 U.S.C. § 843(b)	Use of Telephone to Distribute Marijuana	9/29/05, 10/4/05, 10/5/05, 12/21/05	Ten-Twelve And Sixteen

Sheet 2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 200 months.

This term consists of 200 months on Counts One, term of 60 months on each of Counts Two, Three, Four, Five, Seven, Eight, Nine, Seventeen and Twenty, and terms of 48 months on each of Counts Ten, Eleven, Twelve and Sixteen, all to be served concurrently.

[✓] The court makes the following recommendations to the Bureau of Prisons:

The court will recommend that the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program.

The court will recommend that the defendant be given credit for time he has already been in custody.

[✓] The defendant is remanded to the custody of the United States Marshal.

* * *

RETURN

* * *

Sheet 3

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years.

This term consists of 4 years on Count One, terms of 2 years on each of Counts Two, Three, Four, Five, Seven, Eight, Nine, Seventeen, and Twenty, and terms of 1 year on each of Counts Ten, Eleven, Twelve, and Sixteen, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

* * *

[✓] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check if applicable.)

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable.)

* * *

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Sheet 3A

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

Sheet 5

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6. The assessment is ordered in accordance with 18 U.S.C. § 3013.

	Assessment	Fine	Restitution
Totals:	$1,400	$10,000	$

* * *

Sheet 6

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [✓] Lump sum payment of $11,400 due immediately, balance due

* * *

[✓] in accordance with * * * [✓]F below; or

* * *

F [✓] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Unless, otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to **U.S. District Court, 900 Georgia Ave., Room 309, Chattanooga, TN 37402**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

[✓] The defendant shall forfeit the defendant's interest in the following property to the United States:

See attached Agreed Order of Forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

No. 4:06-cr-14

[Filed May 1, 2007]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
MORRIS ROLLER	)
	)

[Filed May 7, 2007]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
JEFFORY CARL YOUNG	)
	)

Judge Edgar

AGREED PRELIMINARY ORDER OF FORFEITURE

WHEREAS, on October 11, 2006, a federal grand jury sitting in the Eastern District of Tennessee returned an 20-count Superseding Indictment [R. 39] against the defendants, MORRIS ROLLER and JEFFORY CARL YOUNG, charging the defendants with conspiracy to manufacture, distribute and possess with intent to distribute more than one thousand

(1,000) marijuana plants and more than one thousand (1,000) kilograms or more of a mixture and substance containing a detectable amount of marijuana (Count One), knowingly, intentionally and without authority distributing a mixture and substance containing marijuana, a Schedule I controlled substance (Counts Two through Five, Counts Seven through Nine, Count Seventeen, and Count Twenty), knowingly, intentionally and without authority aiding and abetting one another in the possession with the intent to distribute a mixture and substance containing marijuana, a Schedule I controlled substance (Count Six and Count Nineteen), did knowingly and intentionally use a communication facility, that is, a telephone, to facilitate the distribution of marijuana, a Schedule I controlled substance (Counts Ten through Sixteen and Count Eighteen).

WHEREAS, in the Forfeiture Allegations of the Superceding Indictment in the above-styled case and in a subsequently-filed Bill of Particulars in said case, the United States sought forfeiture of the interests of the Defendants, pursuant to Title 21, United States Code, Section 853, in, among other things, $15,174.00 in seized currency, one 1967 Chevrolet Camaro and 31 parcels of real property named in the Forfeiture Allegations of the Superceding Indictment, all of which constitutes or was derived from proceeds obtained, directly or indirectly, as a result of a violation of Title 21, United States Code, Sections 846, 841 and 843, or was property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission said offenses.

WHEREAS, on February 7, 2007, after trial, a duly impaneled jury returned guilty verdicts and verdict

forms against the Defendants, on 2-20 Counts charged in the Superceding Indictment and on Count 1, the jury returned a guilty verdict for a lesser amount of at least one hundred (100) but less than one thousand (1,000) marijuana plants and more than one hundred (100) but less than one thousand (1,000) kilograms or more of a mixture or substance containing marijuana.

Following entry of said guilty verdicts, the parties entered into an agreement as to forfeiture wherein the Defendants, MORRIS ROLLER and JEFFORY CARL YOUNG, agreed to forfeit their interest in the following assets as being forfeitable because they constituted or were derived from proceeds obtained, directly or indirectly, as a result of a violation of Title 21, United States Code, Sections 846, 841 and 843 , or was property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the offenses charged in the Superceding Indictment:

> 3) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 1.5 acres, more or less, and more particularly described at Map 35, Parcel 38.01, described in a deed registered on March 4,1999, in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 35, Parcel

38.01 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 35, Parcel 100.**

4) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 60 acres, more or less, and more particularly described at Map 35, Parcel 1.01, described in a deed registered on March 4, 1999, in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 35, Parcel 1.01 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 34, Parcel 15.**

10) Certain Real Property located in the Tenth Civil District of Cannon County, Tennessee, consisting of 53.8 acres, more or less, and more particularly described at Map 21, Parcel 14, described in a deed registered on September 9, 2004, in Deed Book Number 63, page 695, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. Also recorded on September 1, 2004, in Deed Book Number 424, Page 173, in the land records of the Register of Rutherford County, Tennessee. However, the State of Tennessee has updated

the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 21, Parcel 14 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 21, Parcel 25.**

11) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 266.26 acres, more or less, and more particularly described at Map 34, Parcel 17.01. described in a deed registered on February 6,2004, in Deed Book Number 54, page 207, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 34, Parcel 17.01 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 34, Parcel 30.**

12) Certain Real Property located in the Tenth Civil District of Cannon County, Tennessee, consisting of 353 acres, more or less, and more particularly described at Map 15, Parcel 11, described in a deed registered on September 28, 2000, in Deed Book Number 5, page 597, in the land records of the Register of Cannon County,

Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 15, Parcel 11 in the superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 15, Parcel 17.**

13) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 2.0 acres, more or less, and more particularly described at Map 35, Parcel 1.03, described in a deed registered on January 19, 2001, in Deed Book Number 8, page 755 in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 35, Parcel 1.03 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 34, Parcel 16.**

14) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 64.08 acres, more or less, and more particularly described at Map 28, Parcel 42.04, described in a deed registered on March 4, 1999,

in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 28, Parcel 42.04 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 28, Parcel 98.**

15) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 51.52 acres, more or less, and more particularly described at Map 22, Parcel 7.0, described in a deed registered on March 4, 1999. in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 22, Parcel 7 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 22, Parcel 11.**

16) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 68 acres, more or less, and more

particularly described at Map 35, Parcel 1.04, described in a deed registered on March 4, 1999, in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 35, Parcel 1.04 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 34, Parcel 19.**

17) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 76.5 acres, more or less, and more particularly described at Map 28, Parcel 41.00, described in a deed registered on March 4, 1999, in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 28, Parcel 41 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 27, Parcel 34.**

Personal Property

The defendants' 1967 Chevrolet Camaro identified in the Bill of Particulars belonging to Morris Roller.

WHEREAS, as a part of said agreement between the parties as to the forfeiture of assets, the United States agreed to NOT seek forfeiture in the following real and personal property of the defendants as follows:

Currency

$15,174.00 in United States currency seized from Jeffory Carl Young on May 24, 2006 at 7671 Short Mountain Road, Woodbury. Tennessee.

WHEREAS, the United States agrees that the $15,174.00 in United States currency will be returned to the Defendant, JEFFORY CARL YOUNG by the best efforts of DEA. If said money cannot be returned by DEA then, the defendant is entitled to $15,174.00 from the proceeds of sale of the property forfeited by the United States (property listed above in numbers: 3, 4, and 10 -17). Jeffory Carl Young's attorney, Peter Strianse, will be designated the recipient of the $15,174.00 proceeds on behalf of his client.

Real Property

WHEREAS, the United States also agrees not to pursue forfeiture of the following real properties and to file a motion to release the Protective Orders and file said Releases of Protective Orders in the land records as to the following properties:

1) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 15.22 acres (which is separated into two parcels of 7.522 acres and 7.70 acres), more or less, and more particularly described at Map 28, Parcel 42.00, described in a deed registered on May 6, 1993, in Deed Book Number 164, Pages 23-26, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

2) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 78.50 acres, more or less, and more particularly described at Map 35, Parcel 7.00, described in a deed registered on April 5, 1993, in Record Book 163, Page 401, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

5) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 98.08 acres, more or less, and more particularly described at Map 42, Parcel 035.01, described in a deed registered on June 15, 1993, in Deed Book Number 164, page 171, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Morris Roller.

6) Certain Real Property, address of 5557 Short Mountain Road, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 2.99 acres, more or less, and more

particularly described as Map 26, Parcel 55, in a deed registered on May 19, 2000, in Deed Book Number 311, page 562, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

7) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 89.4 acres, more or less, and more particularly described as Map 12, Parcel 2, in a deed registered on June 11, 1993, in Deed Book Number 274, page 519, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

8) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 100.0 acres, more or less, and more particularly described at Map 43, Parcel 4.0, described in a deed registered on September 12, 1991, in Record Book 158, Page 42, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

9) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 2.5 acres, more or less, and more particularly described at Map 35, Parcel 9.01, described in a deed registered on July 16, 1999, in Record Book 180, Page 586, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

18) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 9.8 acres, more or less, and more particularly described at Map 27, Parcel 7.01, described in a deed registered on March 24, 2005, in Deed Book Number 70, Page 698, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

19) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 102 acres, more or less, consisting of two tracts, and more particularly described at Map 35, Parcel 35, described in a deed registered on April 11, 2005, in Deed Book Number 71, Page 583, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

20) Certain Real Property located in the Seventh Civil District of Cannon County, Tennessee, consisting of 35.03 acres, more or less, and more particularly described at Map 41, Parcel 38.0, described in a deed registered on August 18, 2005, in Deed Book Number 76, Page 659, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

21) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 2 acres, more or less, and more particularly described at Map 42, Parcel 15.01, described in a deed registered on December 13, 2005, in Deed Book Number 81, Page 530, in

the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

22) Certain Real Property located in the Tenth Civil District of Cannon County, Tennessee, consisting of 131.31 acres, more or less, and more particularly described at Map 22, Parcel 14, described in a deed registered on May 16, 2000, in Deed Book Number 1, Page 785, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

23) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 21.1 acres, more or less, and more particularly described at Map 27, Parcel 19.03, described in a deed registered on April 11, 2003, in Deed Book Number 40, Page 586, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

24) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 52.85 acres, more or less, and more particularly described as Map 11, Parcel 1.0, in a deed registered on October 7, 2005, in Deed Book Number 140, page 578, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

25) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee,

consisting of 134.45 acres, more or less, and more particularly described at Map 35, Parcel 15.01, described in a deed registered on January 25, 2002, in Deed Book Number 23, Page 659, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

26) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 59.57 acres, more or less, and more particularly described as Map 13, Parcel 2.0, in a deed registered on June 20, 1996, in Deed Book Number 289, page 835, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

27) Certain Real Property, located in the Ninth Civil District of Cannon County, Tennessee, consisting of 12.55 acres, more or less, and more particularly described as Map 49, Parcel 36.09, in a deed registered on June 15, 1993, in Deed Book Number 164, page 173, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

28) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 28.78 acres, more or less, and more particularly described as Map 13, Parcel 3.03, in a deed registered on January 8, 1998, in Deed Book Number 298, page 67, in the land records of the Register of Warren County,

Tennessee, which is real property belonging to Morris Roller.

29) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 55.41 acres, more or less, and more particularly described as Map 10, Parcel 25, in a deed registered on June 11, 1993, in Deed Book Number 274, page 516, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

30) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 87 acres, more or less, and more particularly described as Map 13, Parcel 1, in a deed registered on June 11, 1993, in Deed Book Number 274, pages 513 and 515, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller. Described in two Quit Claim Deeds. A Quit Claim deed for 15 acres, more or less, recorded in Deed Book 274, Page 513, in the land records of the Register of Warren County, Tennessee. A Quit Claim deed for 72 acres, more or less, recorded in Deed Book 274, Page 515, in the land records of the Register of Warren County, Tennessee.

31) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 75 acres, more or less, and more particularly described at Map 28, Parcel 2.04, described in a deed registered on May 30, 2002, in Record Book 29, Page 69, in the land records

of the Register of Cannon County. Tennessee, which is real property belonging to Jeffory Carl Young.

AND WHEREAS, the Court accepted the forfeiture agreement listed above and has determined that, pursuant to Rule 32.2(b)(1), Federal Rules of Criminal Procedure, based upon the guilty verdicts delivered by the jury and the agreement of the parties, the United States has established the requisite nexus between the guilty verdicts as to Counts 1-20 and the property listed in the Superseding Indictment as properties 3, 4, 10 - 17, and including the defendants' 1967 Chevrolet Camaro identified in the Bill of Particulars belonging to Morris Roller, and are thus subject to forfeiture pursuant to Title 21, United States Code, Section 853(a).

Accordingly, it is hereby **ORDERED, ADJUDGED, and DECREED:**

1. That based upon a verdict of guilty from the federal jury sitting in the Eastern District of Tennessee on all twenty counts of the Superseding Indictment against the defendants, MORRIS ROLLER and JEFFORY CARL YOUNG, the United States is hereby authorized to seize the following property, and the same is hereby forfeited to the United State for disposition in accordance with the law, pursuant to Title 21, United States Code, Sections 853:

3) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 1.5 acres, more or less, and more particularly described at Map 35, Parcel 38.01, described in a deed registered on March 4, 1999,

in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 35, Parcel 38.01 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 35, Parcel 100.**

4) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 60 acres, more or less, and more particularly described at Map 35, Parcel 1.01, described in a deed registered on March 4, 1999, in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers in the Superseding Indictment. This property number was originally designated as Map 35, Parcel 1.01 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 34, Parcel 15.**

10) Certain Real Property located in the Tenth Civil District of Cannon County, Tennessee, consisting of 53.8 acres, more or less, and more

particularly described at Map 21, Parcel 14, described in a deed registered on September 9, 2004, in Deed Book Number 63, page 695, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. Also recorded on September 1, 2004, in Deed Book Number 424, Page 173, in the land records of the Register of Rutherford County, Tennessee. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 21, Parcel 14 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 21, Parcel 25.**

11) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 266.26 acres, more or less, and more particularly described at Map 34, Parcel 17.01, described in a deed registered on February 6, 2004, in Deed Book Number 54, page 207, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 34, Parcel 17.01 in the Superseding Indictment, but now re-designated by the

Cannon County Property Assessor's Office as **Map 34, Parcel 30.**

12) Certain Real Property located in the Tenth Civil District of Cannon County, Tennessee, consisting of 353 acres, more or less, and more particularly described at Map 15, Parcel 11, described in a deed registered on September 28, 2000, in Deed Book Number 5, page 597, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 15, Parcel 11 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 15, Parcel 17.**

13) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 2.0 acres, more or less, and more particularly described at Map 35, Parcel 1.03, described in a deed registered on January 19, 2001, in Deed Book Number 8, page 755 in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number

was originally designated as Map 35, Parcel 1.03 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 34, Parcel 16.**

14) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 64.08 acres, more or less, and more particularly described at Map 28, Parcel 42.04, described in a deed registered on March 4, 1999, in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 28, Parcel 42.04 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 28, Parcel 98.**

15) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 51.52 acres, more or less, and more particularly described at Map 22, Parcel 7.0, described in a deed registered on March 4, 1999, in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the

property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map, 22, Parcel 7 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's office as **Map 22, Parcel 11.**

16) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 68 acres, more or less, and more particularly described at Map 35, Parcel 1.04, described in a deed registered on March 4, 1999, in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 35, Parcel 1.04 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 34, Parcel 19.**

17) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 76.5 acres, more or less, and more particularly described at Map 28, Parcel 41, described in a deed registered on March 4, 1999, in Deed Book Number 179, page 458, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young and Morris Roller. However, the State of Tennessee has updated the Map

and Parcel numbers of Cannon County on March 2006 which reflected a change in the property Map and Parcel numbers listed in the Superseding Indictment. This property number was originally designated as Map 28, Parcel 41 in the Superseding Indictment, but now re-designated by the Cannon County Property Assessor's Office as **Map 27, Parcel 34.**

Personal Property

The defendants' 1967 Chevrolet Camaro identified in the Bill of Particulars belonging to Morris Roller.

2. The United States agrees to NOT seek forfeiture of the following real and personal property of the defendants as follows, and further agrees to file motions to release the Protective Orders and file said Releases of Protective Orders in the land records of said real properties described below:

Currency

$15,174.00 in United States currency seized from Jeffory Carl Young on May 24, 2006 at 7671 Short Mountain Road, Woodbury, Tennessee. Jeffory Carl Young's attorney, Peter Strianse, will be designated the recipient of the $15,174.00 proceeds on behalf of his client

Real Property

1) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 15.22 acres (which is separated into two parcels of 7.522 acres and 7.70 acres),

more or less, and more particularly described at Map 28, Parcel 42.00, described in a deed registered on May 6, 1993, in Deed Book Number 164, Pages 23-26, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

2) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 78.50 acres, more or less, and more particularly described at Map 35, Parcel 7.00, described in a deed registered on April 5, 1993, in Record Book 163, Page 401, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

5) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 98.08 acres, more or less, and more particularly described at Map 42, Parcel 035.01, described in a deed registered on June 15, 1993, in Deed Book Number 164, page 171, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Morris Roller.

6) Certain Real Property, address of 5557 Short Mountain Road, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 2.99 acres, more or less, and more particularly described as Map 26, Parcel 55, in a deed registered on May 19, 2000, in Deed Book Number 311, page 562, in the land records of the Register of Warren County, Tennessee,

which is real property belonging to Morris Roller.

7) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 89.4 acres, more or less, and more particularly described as Map 12, Parcel 2, in a deed registered on June 11, 1993, in Deed Book Number 274, page 519, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

8) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 100.0 acres, more or less, and more particularly described at Map 43, Parcel 4.0, described in a deed registered on September 12, 1991, in Record Book 158, Page 42, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

9) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 2.5 acres, more or less, and more particularly described at Map 35, Parcel 9.01, described in a deed registered on July 16, 1999, in Record Book 180, Page 586, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

18) Certain Real Poeperty located in the Ninth Civil District of Cannon County, Tennessee, consisting of 9.8 acres, more of less, and more

particularly described at Map 27, Parcel 7.01, described in a deed registered on March 24, 2005, in Deed Book Number 70, Page 698, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

19) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 102 acres, more or less, consisting of two tracts, and more particularly described at Map 35, Parcel 35, described in a deed registered on April 11, 2005, in Deed Book Number 71, Page 583, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

20) Certain Real Property located in the Seventh Civil District of Cannon County, Tennessee, consisting of 35.03 acres, more or less, and more particularly described at Map 41, Parcel 38.0, described in a deed registered on August 18, 2005, in Deed Book Number 76, Page 659, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

21) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 2 acres, more or less, and more particularly described at Map 42, Parcel 15.01, described in a deed registered on December 13, 2005, in Deed Book Number 81, Page 530, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

22) Certain Real Property located in the Tenth Civil District of Cannon County, Tennessee, consisting of 131.31 acres, more or less, and more particularly described at Map 22, Parcel 14, described in a deed registered on May 16, 2000, in Deed Book Number 1, Page 785, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

23) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 21.1 acres, more or less, and more particularly described at Map 27, Parcel 19.03, described in a deed registered on April 11, 2003, in Deed Book Number 40, Page 586, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

24) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 52.85 acres, more or less, and more particularly described as Map 11, Parcel 1.0, in a deed registered on October 7, 2005, in Deed Book Number 140, page 578, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

25) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 134.45 acres, more or less, and more particularly described at Map 35, Parcel 15.01, described in a deed registered on January 25, 2002, in Deed Book Number 23, Page 659, in

the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

26) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 59.57 acres, more or less, and more particularly described as Map 13, Parcel 2.0, in a deed registered on June 20, 1996, in Deed Book Number 289, page 835, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

27) Certain Real Property, located in the Ninth Civil District of Cannon County, Tennessee, consisting of 12.55 acres, more or less, and more particularly described as Map 49, Parcel 36.09, in a deed registered on June 15, 1993, in Deed Book Number 164, page 173, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

28) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 28.78 acres, more or less, and more particularly described as Map 13, Parcel 3.03, in a deed registered on January 8,1998, in Deed Book Number 298, page 67, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

29) Certain Real Property, located in the Twelfth Civil District of Warren County,

Tennessee, consisting of 55.41 acres, more or less, and more particularly described as Map 10, Parcel 25, in a deed registered on June 11, 1993, in Deed Book Number 274, page 516, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller.

30) Certain Real Property, located in the Twelfth Civil District of Warren County, Tennessee, consisting of 87 acres, more or less, and more particularly described as Map 13, Parcel 1, in a deed registered on June 11, 1993, in Deed Book Number 274, pages 513 and 515, in the land records of the Register of Warren County, Tennessee, which is real property belonging to Morris Roller. Described in two Quit Claim Deeds. A Quit Claim deed for 15 acres, more or less, recorded in Deed Book 274, Page 513, in the land records of the Register of Warren County, Tennessee. A Quit Claim deed for 72 acres, more or less, recorded in Deed Book 274, Page 515, in the land records of the Register of Warren County, Tennessee.

31) Certain Real Property located in the Ninth Civil District of Cannon County, Tennessee, consisting of 75 acres, more or less, and more particularly described at Map 28, Parcel 2.04, described in a deed registered on May 30, 2002, in Record Book 29, Page 69, in the land records of the Register of Cannon County, Tennessee, which is real property belonging to Jeffory Carl Young.

3. The United States shall return the $15,174.00 in United States currency to the Defendant, JEFFORY CARL YOUNG by the best efforts of DEA. If said money cannot be returned by DEA then the defendant is entitled to $15,174.00 from the proceeds of sale of the property forfeited by the United States (properties: 3.4, and 10-17 of the Superseding Indictment). Jeffory Carl Young's attorney, Peter Strianse, will be designated the recipient of the $15,174.00 proceeds on behalf of his client.

4. Pursuant to Title 21, United States Code, Section 853(n)(1), the United States Marshal forthwith shall publish at least once for three consecutive weeks in a newspaper of general circulation, notice of this Order, Notice of the Marshal's intent to dispose of the property in such manner as the Attorney General may direct and notice that any person, other than the Defendant, having or claiming a legal interest in any of the above-listed forfeited property must file a petition with the court within thirty (30) days of the final publication of notice or of receipt of actual notice, whichever is earlier.

5. This notice shall state that a petition for a hearing to adjudicate the validity of the petitioner's alleged interest in the property shall be signed by the petitioner under penalty of the perjury and shall set forth the nature and extent of the petitioner's right, title and interest in the forfeited property, the time and circumstances of the petitioner's acquisition of the right, title and interest in the property any additional facts supporting the petitioner's claim and the relief sought. The United States may also, to the extent practical, provide direct written notice to any person,

as a substitute for published notice as to those persons so notified.

6. That upon adjudication of all other or third-party interests in said property, this court will enter a Final Order of Forfeiture pursuant to Title 21, United States Code, Section 853(n), in which all interests will be addressed.

7. The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to the Federal Rules of Criminal Procedure 32.2(e).

8. That the Clerk of this Court shall provide a certified copy of this Order to the United States Marshals Service and to the United States Attorney's Office.

ENTER:

/s/
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

Submitted by:

JAMES R. DEDRICK
United States Attorney

By: /s/
PERRY H. PIPER
Assistant United States Attorney

Agreed upon by:

/s/ _____
MORRIS ROLLER

/s/ _____
GERALD H. SUMMERS, ESQ.
Attorney for Defendant Morris Roller

APPENDIX C

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

Case Number: 4:06-CR-14-002

[Dated May 15, 2007]

UNITED STATES OF AMERICA)
)
v.)
)
JEFFORY CARL YOUNG)
)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or
After November 1, 1987)

Peter Strianse
Defendant's Attorney

THE DEFENDANT:

* * *

[✓] was found guilty on count(s) One, Six, Thirteen through Fifteen, Eighteen, and Nineteen of the Superseding Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
See next page.			

The defendant is sentenced as provided in pages 2 through 7 of this judgment and the Statement of Reasons. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. §3553.

* * *

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

5/7/2007
Date of Imposition of Judgment

/s/ R. Allan Edgar
Signature of Judicial Officer

R. ALLAN EDGAR, United States District Judge
Name & Title of Judicial Officer

May 15, 2007
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 846 and 841(b)(1)(B)	Conspiracy to Distribute 100 Kilograms or More of marijuana	5/24/06	One
21 U.S.C. § 841(a)(1) and (b)(1)(D)	Distribution of Marijuana	8/27/04, 1/31/06	Six and Nineteen
21 U.S.C. § 843(b)	Use of Telephone to Distribute Marijuana	12/12/05, 12/12/05, 12/21/05, 1/26/06	Thirteen through Fifteen and Eighteen

Sheet 2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 224 months.

This consists of a term of 224 months on Count One, terms of 120 months on each of Counts Six and Nineteen, and terms of 96 months on each of Counts Thirteen, Fourteen, Fifteen, and Eighteen, all to be served concurrently.

[✓] The court makes the following recommendations to the Bureau of Prisons:

The court will recommend that the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program.

[✓] The defendant is remanded to the custody of the United States Marshal.

* * *

RETURN

* * *

Sheet 3

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 years.

This term consists of 8 years on Count One, terms of 4 years on each of Counts Six and Nineteen, and terms of 3 years on each of Counts Thirteen, Fourteen, Fifteen and Eighteen, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

* * *

[✓] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check if applicable.)

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable.)

* * *

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Sheet 3A

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

Sheet 5

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6. The assessment is ordered in accordance with 18 U.S.C. § 3013.

	Assessment	Fine	Restitution
Totals:	$700	$15,000	$

* * *

Sheet 6

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [✓] Lump sum payment of $15,700 due immediately, balance due

* * *

[✓] in accordance with * * * [✓]F below; or

* * *

F [✓] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Unless, otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to **U.S. District Court, 900 Georgia Ave., Room 309, Chattanooga, TN 37402**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

[✓] The defendant shall forfeit the defendant's interest in the following property to the United States:

See attached Agreed Order of Forfeiture. [Pages 52a to 82a in this Appendix.]

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX D

UNITED STATES DISTRICT COURT
for the EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

JUDGMENT: Case No: 4:06-CR-14-001

USA v. Morris Roller

PRESENT: Honorable R. Allan Edgar U.S. District Judge /U.S. Magistrate Judge

Perry Piper — Assistant U.S. Attorney
Jerry Summers — App/Ret Attorney for Defendant

Gary Turney — Probation Officer

Stefanie Capetz — Deputy Clerk
Shannan Andrews — Court Reporter

* * *

PROCEEDINGS: PSR guidelines are ✓ accurate

* * *

TESTIMONY BY: Mark Delaney

DEFT COMMITTED TO CUSTODY OF BUREAU OF PRISONS FOR TERM OF 200 MONTHS. This term

consists of: 200 mos. Ct. 1, 60 mos. Cts. 2, 3, 4, 5, 7, 8, 9, 17, 20, & 48 mos on 10, 11, 12, 16

DEFT PLACED ON SUPERVISED RELEASE/ PROBATION FOR TERM OF 4 YEARS. This term consists of: 4 yrs. Ct. 1, 2 yrs. 2, 3, 4, 5, 7, 8, 9, 17, 20 & 1 yr. on each of Cts. 10, 11, 12, 16

CONDITIONS OF SUPERVISED RELEASE/ PROBATION: Deft shall

✓ report to Probation Officer w/in 72 hours of release
✓ not commit another federal, state or local crime
✓ abide by standard conditions on Local Rule 83.10
✓ not possess a firearm or other destructive device
✓ not illegally possess or use a controlled substance
✓ participate in program of testing/treatment for drug/alcohol abuse
✓ participate in collection of DNA

* * *

✓ Court recommends deft receive 500 hours substance abuse treatment from the BOP's residential drug treatment facility

OTHER RECOMMENDATIONS: Credit for time served

* * *

FINE: $10,000 SPECIAL ASSESSMENT: $1,400

✓ pmt due immediately ___ Interest waived
__ Court waived fine due to deft's inability to pay
✓ Deft informed of right to appeal
__ Remaining counts dismissed

Deft __ remanded to custody of U.S. Marshall
✓ remained in custody ___ remained on bond

Time: 9:30 to 11:00 Date: 5/7/2007

APPENDIX E

UNITED STATES DISTRICT COURT
for the EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

JUDGMENT: Case No: 4:06-cr-14-002

USA v. Jeffory C. Young

PRESENT: Honorable R. Allan Edgar U.S. District Judge /U.S. Magistrate Judge

Perry Piper
Assistant U.S. Attorney

Peter Strianse App/Ret
Attorney for Defendant

Gary Turney
Probation Officer

Stefanie Capetz
Deputy Clerk

Shannan Andrews
Court Reporter

* * *

PROCEEDINGS: PSR guidelines are ✓ accurate

* * *

TESTIMONY BY:_____

DEFT COMMITTED TO CUSTODY OF BUREAU OF PRISONS FOR TERM OF 224 MONTHS. This term

consists of: 224 Ct. 1; 120 mos. Cts. 6, 19; 96 mos. 13, 14, 15, 18 concurrently

DEFT PLACED ON SUPERVISED RELEASE/ PROBATION FOR TERM OF 8 YEARS. This term consists of: 8 yrs. Cts. 1, ; 4 yrs 6, 19; 3 yrs. 13, 14, 15, 18 concurrently

CONDITIONS OF SUPERVISED RELEASE/ PROBATION: Deft shall

✓ report to Probation Officer w/in 72 hours of release
✓ not commit another federal, state or local crime
✓ abide by standard conditions on Local Rule 83.10
✓ not possess a firearm or other destructive device
✓ not illegally possess or use a controlled substance
✓ participate in program of testing/treatment for drug/alcohol abuse
✓ participate in collection of DNA

* * *

~~OTHER CONDITIONS:~~ (Forfeiture papers taken by Court)

✓ Court recommends deft receive 500 hours substance abuse treatment from the BOP's residential drug treatment facility

* * *

FINE: $15,000 SPECIAL ASSESSMENT: $700

✓ Pmt due immediately ___ Interest waived
__ Court waived fine due to deft's inability to pay
✓ Deft informed of right to appeal
__ Remaining counts dismissed
Deft __ remanded to custody of U.S. Marshall

✓ remained in custody ___ remained on bond

Time: 11:05 to 12:05 Date: 5/7/2007

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 07-5600/5608

[Filed April 1, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
JEFFORY C. YOUNG (07-5600),	)
MORRIS ROLLER (07-5608),	)
	)
Defendants-Appellants.	)
	)

ORDER

BEFORE: MERRITT, MOORE, and COLE, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX G

TITLE 21 - FOOD AND DRUGS
CHAPTER 13 - DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I - CONTROL AND ENFORCEMENT
Part D - Offenses and Penalties

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * *

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving --

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be

sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

TITLE 28 - JUDICIARY AND
JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 81 - SUPREME COURT

28 U.S.C. § 1254 Courts of appeals; certiorari; certified questions

Cases in the court s of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

CHAPTER 83 - COURTS OF APPEALS

28 U.S.C. § 1291 Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

APPENDIX H

November 1, 2006
UNITED STATES SENTENCING
GUIDELINES MANUAL

§2D1.1

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	**Base Offense Level**
* * *	
	Level 32
(4) • At least 1 KG but less than 3 KG of Heroin; • At least 5 KG but less than 15 KG of Cocaine; • At least 50 G but less than 150 G of Cocaine Base; • At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual); • At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice"; • At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual); • At least 10 G but less than 30 G of LSD;	

- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

Level 30

(5)
- At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 35 G but less than 50 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl;

- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

Level 28

(6)
- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 20 G but less than 35 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;

- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

Level 26

(7)
- At least 100 G but less than 400 G of Heroin;
- At least 500 G but less than 2 KG of Cocaine;
- At least 5 G but less than 20 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD;
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;

- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

* * *

§3B1.1

PART B - ROLE IN THE OFFENSE

* * *

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

* * *

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

Case No. 4:06-CR-14-001

[Filed February 9, 2007]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
MORRIS ROLLER	)
	)

Judge Edgar

VERDICT FORM

(1) We, the jury, unanimously find the defendant, MORRIS ROLLER, is guilty of the offense charged in COUNT ONE of the indictment.

[If you find the defendant is guilty of the offense charged in COUNT ONE, answer Question (1A). If you find the defendant is not guilty of the offense charged in COUNT ONE, skip and do not answer Questions (1A) through (1H), and proceed to answer Question (2).]

(1A) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved one thousand (1,000) or more marijuana plants.

_____	No
Yes	No

[If you answered "Yes" to Question (1A), skip Questions (1B), (1C) and (1D), and proceed to answer Question (1E). If you answered "No" to Question (1A), answer Question (1B).]

(1B) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved at least one hundred (100) but less than one thousand (1,000) marijuana plants.

✓	_____
Yes	No

[If you answered "Yes" to Question (1B), skip Questions (1C) and (1D) and proceed to answer Question (1E). If you answered "No" to Question (1B), answer Question (1C).]

(1C) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved at least fifty (50) but less than one hundred (100) marijuana plants.

_____	_____
Yes	No

[If you answered "Yes" to Question (1C), skip Question (1D) and proceed to answer Question (1E). If you answered "No" to Question (1C), answer Question (1D).]

(1D) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved less than fifty (50) marijuana plants.

Yes	No

(1E) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved one thousand (1,000) or more kilograms of a mixture or substance containing marijuana.

Yes	No
	✓

[If you answered "Yes" to Question (1E), skip Questions (1F), (1G) and (1H), and proceed to answer Question (2). If you answered "No" to Question (1E), answer Question (1F).]

(1F) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved at least one hundred (100) but less than one thousand (1,000) kilograms of a mixture or substance containing marijuana.

Yes	No
✓	

[If you answered "Yes" to Question (1F), skip Questions (1G) and (1H), and proceed to answer Question (2). If you answered "No" to Question (1F), answer Question (1G).]

(1G) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved at least fifty (50) but less than one hundred (100) kilograms of a mixture or substance containing marijuana.

_____ _____
Yes No

[If you answered "Yes" to Question (1G), skip Question (1H) and proceed to answer Question (2). If you answered "No" to Question (1G), answer Question (1H).]

(1H) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved less than fifty (50) kilograms of a mixture or substance containing marijuana.

_____ _____
Yes No

* * *

/s/ _____
Foreperson

Feb 7, 2007
Date

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

Case No. 4:06-CR-14-002

[Filed February 9, 2007]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
JEFFORY CARL YOUNG	)
	)

Judge Edgar

VERDICT FORM

(1) We, the jury, unanimously find the defendant, JEFFORY CARL YOUNG, is guilty of the offense charged in COUNT ONE of the indictment.

[If you find the defendant is guilty of the offense charged in COUNT ONE, answer Question (1A). If you find the defendant is not guilty of the offense charged in COUNT ONE, skip and do not answer Questions (1A) through

(1H), and proceed to answer Question (2).]

(1A) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved one thousand (1,000) or more marijuana plants.

Yes	No
_____	✓

[If you answered "Yes" to Question (1A), skip Questions (1B), (1C) and (1D), and proceed to answer Question (1E). If you answered "No" to Question (1A), answer Question (1B).]

(1B) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved at least one hundred (100) but less than one thousand (1,000) marijuana plants.

Yes	No
✓	_____

[If you answered "Yes" to Question (1B), skip Questions (1C) and (1D) and proceed to answer Question (1E). If you answered "No" to Question (1B), answer Question (1C).]

(1C) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved at least fifty (50) but less than one hundred (100) marijuana plants.

_____	_____
Yes	No

[If you answered "Yes" to Question (1C), skip Question (1D) and proceed to answer Question (1E). If you answered "No" to Question (1C), answer Question (1D).]

(1D) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved less than fifty (50) marijuana plants.

_____	_____
Yes	No

(1E) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved one thousand (1,000) or more kilograms of a mixture or substance containing marijuana.

_____	✓
Yes	No

(If you answered "Yes" to Question (1E), skip Questions (1F), (1G) and (1H), and proceed to answer Question (2). If you answered "No" to Question (1E), answer Question (1F).]

(1F) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved at

least one hundred (100) but less than one thousand (1,000) kilograms of a mixture or substance containing marijuana.

✓	
Yes	No

[If you answered "Yes" to Question (1F), skip Questions (1G) and (1H), and proceed to answer Question (2). If you answered "No" to Question (1F), answer Question (1G).]

(1G) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved at least fifty (50) but less than one hundred (100) kilograms of a mixture or substance containing marijuana.

Yes	No

[If you answered "Yes" to Question (1G), skip Question (1H) and proceed to answer Question (2). If you answered "No" to Question (1G), answer Question (1H).]

(1H) We, the jury, unanimously find that the conspiracy charged in COUNT ONE involved less than fifty (50) kilograms of a mixture or substance containing marijuana.

Yes	No

* * *

/s/_____
Foreperson

Feb 7, 2007
Date

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

No. CR-4-06-14

[Dated May 7, 2007]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
-versus-	)
	)
MORRIS ROLLER and	)
JEFFORY C. YOUNG,	)
	)
Defendants.	)
	)

Chattanooga, Tennessee
May 7, 2007

BEFORE: THE HONORABLE R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER,

Assistant United States Attorney
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT ROLLER:

JERRY SUMMERS, ESQ., and
MARYA L. WEGENKA, ESQ., of
Summers & Wyatt
The James Building, Suite 800
Chattanooga, Tennessee 37402

FOR THE DEFENDANT YOUNG:

PETER J. STRIANSE, ESQ., of
Tune, Entrekin & White
315 Deaderick Street, Suite 1700
Nashville, Tennessee 37238-1700

JUDGMENT PROCEEDINGS
PAGES 1 THROUGH 96

[p.2] THE COURT: Case No. 4-06-CR-14, United States of America versus Morris Roller and Jeffory Young.

* * *

THE COURT: Okay. Let's start out, we have both defendants here just for the record. And the record will also reflect that counsel for both defendants are present, as well as Mr. Piper on behalf of the United States Attorney's Office.

Why don't we start out with Mr. Roller and we'll then move to Mr. Young.

* * *

[p.4] THE COURT: Okay. There are a number of objections, so let's just start with the first one, maybe the best one to start with, the drug quantities, since that seems to be

MR. SUMMERS: Your Honor, I think that if we believe in the integrity of the jury with certain safeguards by the Court to correct any extraneous or extraordinary wrong by a jury, and I think it's a very fundamental concept of our democracy that we accept a jury's verdict. The government -- I know Mr. Piper will respectfully disagree with me on that, because the jury in the case did not give the government everything they wanted. They got enough, but not quite everything.

In this particular case, Your Honor, the Court did establish the jury on a special instruction to the Court, special question to the jury, did determine that the applicable sentence was a mandatory-minimum of five years. Mandatory-minimum. That's the -- I can't go any lower than, Your Honor. There is no 5K1 substantial assistance. There is nothing that would state the government acted in bad faith. And the question is, and as to whether this Court will be called upon based upon all of the facts and circumstances to establish a sentence within its discretion somewhere in that particular range we respectfully say that the Court should sentence him, and that's what we ask the Court to sentence him.

[p.5] A number of objections, Your Honor, of course, we've listed some objections, without going into much detail, that we believe that the testimony with all due

respect to Mr. Turney, and very seldom have I ever had a difference with Mr. Turney, in this case, I do, but that happens. But he always, I think, tries hard to be as fair as he can. We just differ in the case, and I respectfully note that.

Your Honor, the objections that we noted in this particular, the amount, the biggest one is on Paragraph 31 is the Texas marijuana load, the 2300 pounds. The evidence that -- the jury heard the evidence, what was put into the proof, Your Honor, there was no one, none of those individuals, those Hispanics that were arrested, none of them came forward to testify about being involved. There was certain innuendoes. There had been some conversations that Mr. Roller had had with Ms. Foutch about which we put in a category, Your Honor, of puffing courtship where he was trying to make sexual overtures with her. And there was no proof that any of this occurred in the record. And the jury rejected that with their finding, obviously, 2300 pounds was not considered. And we respectfully ask the Court to honor the decision by the jury.

The other matters, Your Honor, there was, on Paragraph 27, an estimate of the amount of marijuana that Mr. Murray received from Mr. Young during the 13 and 14-year [p.6] conspiracy, whether that can be attributed to Mr. Roller, we respectfully differ. I believe, Your Honor, our notes, and with all due respect to Ms. Wagenka has helped me considerably on that, Mr. Murray, we do not believe, we do not believe that Murray ever testified to an amount of 800 pounds, but, nevertheless, whatever it is, Your Honor, the jury made a determination listening to all of the evidence presented by the government, all of the recordings, and

so forth, and came up with the conspiracy of less than 100 or 100 to 1000 marijuana plants, and, plus, they found him guilty of the conspiracy plus the nine distributing and the four telephonic counts, which has a mandatory-minimum of 60 months. That's, basically, I think what I had to say on the amounts, Your Honor.

The other --

THE COURT: Let's deal with that first, because that's kind of -- let's deal with the issues one by one.

MR. SUMMERS: All right, sir.

THE COURT: Okay. Mr. Piper, what's your position on the amounts?

MR. PIPER: Well, Mr. Summers says I disagree with him. I do not disagree with anything other than the amount that he's talked about. Candidly, Your Honor, the jury found the defendant guilty of an offense which gives the Court the range of five to 40 years. And we're not asking the Court to [p.7] sentence Mr. Roller to more than 40 years today. And I don't mean to be flippant about that either, Mr. Summers, I'm being quite candid. My argument, Judge, is that the Sixth Circuit has repeatedly found, indeed, the Supreme Court has found that there is a differing standard of proof at sentencing as opposed to trial. I read a case yesterday, and, unfortunately, I left it on my desk, but the Supreme Court said juries acquitted or convicted for a number of reasons unrelated to sentencing. It could be sympathy. It could be anger. That's why Your Honor is a judge and Your Honor has now much greater discretion than the Court had previous to the *Booker* case.

I would invite the Court's attention to a case called *Solario*, which is a Sixth Circuit case, 337 F.3d 580 at Page 596, which states there is obviously a differing standard of review applicable to sentencing than at trial. And Mr. Summers wants to argue that the defendant is a Level 26 because the defendant has been found guilty of more than 100 kilograms but less than 1,000, and the folly in that, Your Honor, and I say this respectfully is that, well, why not make it a Level 30, they found him guilty of less than 1,000, so let's say it's 999 kilos under Mr. Summer's analogy.

And my argument is, Judge, that there was overwhelming proof here of not just the 2318 pounds, but the fact that Mr. Roller has dealt marijuana for years and years and years. The Court heard the proof. The proof was [p.8] overwhelming, even though Mr. Summers says it was in the vein of mere puffing when he's allegedly trying to seduce Ms. Foutch concerning these marijuana sales, in reality, when Mr. Roller was telling Ms. Foutch how the Mexicans got caught, he was telling her that in the event that she did do something for him. He was trying to prevent her from making the same mistakes they did. And how do we know that? It's the same incident, Ms. Foutch even testified she went down with Mr. Roller to the small piece of land at Judge Purser Hill Road, I think it's about an acre, it's where the incident occurred, Judge, where the Hispanics with the 2300 pounds of marijuana were arrested, and he talked about it to her. He said that's where they were caught, then referenced, he referenced that to her in later conversations.

So, clearly, the Level 32, Judge, is an appropriate level for marijuana in this case. The proof has shown,

at least by a preponderance of the evidence, Your Honor, that these defendants distributed over 2200 pounds of marijuana which is 1,000 kilos or a Level 32.

THE COURT: All right.

MR. SUMMERS: Can I briefly rebut that, Your Honor?

THE COURT: Okay.

MR. SUMMERS: Many times I've heard Mr. Piper argue as well as his colleagues at the United States Attorney's Office the jury found it, the jury found it, Judge, don't [p.9] insult -- don't discredit the jury. All I'm doing is turning it around on him in this case.

THE COURT: Yeah.

MR. SUMMERS: Because the jury did hear it. I fully recognize the Court looks at a different standard in sentencing, but there is safeguards, Your Honor, from a runaway ridiculous result. The jury did not find this. They measured the credibility of the witnesses, found him guilty of the counts which he pled, and which they, which he admitted, accepted that, and that's what they determined. And I think it would be an encroachment upon the integrity of the jury if it should be disregarded pursuant to Mr. Piper's request with all due deference.

MR. PIPER: Judge, may I respond to that, please?

THE COURT: No. We got to cut this off somewhere.

MR. PIPER: Thank you.

THE COURT: Well, of course, the reason that the verdict form was posed the way it was was to make sure that the statute was complied with. And when you've got the presentence report saying in Paragraph 46 that there were 1602 kilograms of marijuana here, the jury said it was between 100 and 1,000 kilograms, what that means is, what the jury verdict means is that you're here dealing with 21 U.S.C. (b) (1) (B) instead of (b) (1) (A), and that a sentence of five to 40 years is the sentencing statutory range here. But so long as the sentencing [p.10] guidelines are advisory, as they are under *Booker*, the Court is not bound by the jury's determination. It has to ascertain what the guidelines are. I think that's the law. Now, you know, it may not be what you think is right, Mr. Summers.

MR. SUMMERS: Judge, I argued what you're saying in 1984 on the other side of it, as you well know, I've been arguing ever since they came out you should have more discretion. I hope it's not going to bite me the other way today.

THE COURT: Well, anyway, I mean, what I've said is the law as it currently stands, it might change, but that's the way it is today. And that's what I have to be governed by today. So, it does matter what we have here in the way of actual drug quantities that were proved at trial.

Now, let me just go down, because it seems to me that there are, there are a number of disputed areas here or at least as far as the presentence report is concerned. The presentence writer specified certain things which made up his total of 1602 kilograms. One

of which is the Texas tractor trailer load which you already pointed out, you dispute that.

Let me ask you this. What about the sales to Ms. Foutch?

MR. SUMMERS: That's not disputed, Your Honor. We admitted that in our opening statement.

THE COURT: Okay. So, there were, according to the [p.11] presentence report, there were 15 pounds for that.

MR. SUMMERS: That's correct.

THE COURT: I think my trial notes said 16, but --

MR. SUMMERS: Something close.

THE COURT: Something there. 15 pounds. You dispute the 800 pounds as far as Mr. Murray is concerned, is that correct?

MR. SUMMERS: Yes, Your Honor.

THE COURT: You say that should not be attributed to your client?

MR. SUMMERS: That's Paragraph 27, Judge. I can give them to you exact paragraphs if you want from my notes.

THE COURT: That's Paragraph 27. And the other one is Paragraph 30, right?

MR. SUMMERS: Well, 28, Your Honor, there would have been 11 pounds hidden at his house, we don't deny that. Paragraph 28, we objected to it on another basis, that was the gun part of it. There was 27.4 grams inside and 11 pounds outside or 11 pounds one ounce and a half.

THE COURT: Okay.

MR. SUMMERS: Well, Paragraph 30, Your Honor, is Roller explained to the informant that he arranged to pick up multiple shipments of marijuana, that never -- you know, we reviewed that transcript. There is no mention of him stating there are multiple shipments or weights of those shipments [p.12] there to indicate they ever came in other than just talk.

Thirty-one, as Your Honor indicated, 31 is the shipment from Texas.

Paragraphs 39, 42 and 43, Your Honor, is the case in Dekalb County on the state charges, 78 marijuana plants. So, we objected to that, but for other reasons as well, but that's the one you can consider.

And I think that that Paragraph 40 his admitting receiving large shipments on a routine basis, Your Honor, that's the puffing part of it, too.

And I think that the Paragraph 46 is the one that deals with the calculations by Mr. Turney.

THE COURT: Okay. Well, let's -- Mr. Piper, what do you think about these quantities here, because according to the guidelines a Level 32 you've got to have 1,000 kilograms?

MR. PIPER: 2200 pounds, Judge.

THE COURT: Right.

MR. PIPER: Mr. Summers' claims Mr. Roller -- there was never any evidence that these loads came in. Well, of course, there was evidence, Your Honor, because the defendant sold marijuana throughout a period of, I guess, 16 or 18 months, and there were numerous other people that testified that the defendant was selling marijuana or, in fact, growing marijuana, very large quantities.

The defendant stated, if the Court will recall the [p.13] proof, and I'm just talking about Mr. Turney says 450 pounds, Mr. Roller alluded on the tape that it was generally around 500 pounds of these shipments that would come in. The Court will recall frequently Ms. Foutch would ask Mr. Roller about taking a trip of Texas to pick up marijuana. She never took one, however, Mr. Roller clearly said that he had people that would run down there. And he had one guy he paid him $10,000. Your Honor may recall the guy said -- Mr. Roller said the fellow said I'm not going to do it again, I'm not going to do it again, but sure enough, the next time a load came around he would make it because the money was too good, and that's what Mr. Roller was saying about that guy.

There are references to at least four trips to Texas to pick up marijuana during the pendency of the wiretap or the consensually monitored telephone calls or in-person conversations between Mr. Roller and Ms. Foutch. And if the Court just looked at that quantity right there, 400 and 450 pounds. And I would also respectfully tell the Court that Mr. Roller just didn't

start dealing marijuana when Ms. Foutch came on the scene. He didn't just start bringing in this marijuana when Ms. Foutch came on the scene. He's been doing this for a long time.

Wayne Amonett stated that he was getting marijuana from the defendant back in the days when they were at the Moose Lodge in Warren County. He would get a pound from him, [p.14] but ultimately he got 10 pounds on a couple of occasions. And on one occasion he got, he left the barrel top off and 200 pounds, I think, roughly 200 pounds got wet and that was in the '90s. That wasn't even during the time that Ms. Foutch was dealing with the defendant. There are just a number of incidents where obviously people were growing, Mr. Roller and Mr. Young were growing marijuana, they were stripping those plants. We had, I think, three people testify to that or perhaps four, Ricky Estes --

THE COURT: The property that the Mexican shipment went to, was that jointly owned or --

MR. PIPER: Jointly owned by Mr. Roller and Mr. Young, yes, sir.

THE COURT: All right. And, okay.

MR. PIPER: Was in the freezer, as the Court will recall, we had a little cardboard box from the freezer bags where we confiscated something from Mr. Young's, and Mr. Roller and Mr. Young I don't think it's been disputed that they were in a conspiracy, although, Mr. Summers disputed it during trial. And Mr. Summers, I would also note, Your Honor, says lets not disputing the 11 pounds today, but he vigorously

contested that at trial. That 11 pounds that was found in Mr. Roller's outbuilding.

THE COURT: Yeah.

MR. PIPER: Actually, his garage. Judge, I think the [p.15] evidence as far as the sentencing phase is concerned is overwhelming that Mr. Turney has it correct with 1602 kilograms of marijuana. And I would respectfully submit to the Court that's a low number. That's a very conservative estimate.

THE COURT: All right. Well, here's -- Mr. Summers, you want to say anything more about the drug quantities?

MR. SUMMERS: No. He basically was accurate, Your Honor, the only thing I would say is that we did not dispute in this sentencing, at this trial that there was some issue as to whether that was actually 11 pounds, Your Honor, but we never, you know, the jury has found that that 11 pounds was his.

THE COURT: All right. All right. Well, here's what I think about this. Let's talk about the biggest items, which, of course, is the Texas, is the Texas pot, you know. The proof showed that they found it in furniture after it crossed the border down there. And then it came up here. It went all of the way from Texas up here to Judge Purser Hill Road or wherever it is, which is an address that, a property that belonged to, partly to Mr. Roller, and, of course, Mr. Young, as well. So it came to their property.

We know that they -- we know that they were getting from all of the evidence in the case, tapes and

otherwise, we know they were getting the marijuana from Mexico in addition to what they were growing. There was a white, as I recall, there was testimony that there was a white pick-up in the area [p.16] somewhere around the time that the pot was being delivered by the folks from Mexico, and that white pick-up belonged to Mr. Young. I think that there was testimony, and someone correct me if I'm wrong, that Mr. Young and Mr. Roller both changed vehicles frequently.

MR. PIPER: That was from James Pete Murray, Your Honor, when he testified that they were -- Wayne Amonett, I'm sorry -- that they were fearful of their lives. And they were changing vehicles every hour.

THE COURT: They were afraid the Mexicans were going to come after them, because the law, the load had been taken over by the DEA, I guess.

MR. PIPER: And ICE Agent Jim Balsamo also stated that he had talked to Mr. Young the next day concerning the incident as well, as the Court may recall. And that Mr. Young admitted to being present when the marijuana delivery occurred. He was actually, I think, weedeating at the time, or dropped his weedeater --

THE COURT: I have no qualms with finding that Mr. Roller, along with Mr. Young, was involved with that shipment. I mean, that was their pot. And so, with that, you know, and I find that by a preponderance of the evidence based upon the factors that we just mentioned here. And, of course, that's enough by itself to get it over the 2200 pounds to a Level 32.

But I also find that, of course, in addition to that, there was 11 pounds found at Mr. Roller's house at the time of the search warrant. Fifteen pounds we know he sold to Ms. Foutch. And he did talk to Ms. Nunley as recounted in Paragraph 30. And he was talking about all of the shipments that they received and they each weighed 400, 400 to 450 pounds. Just counting one of those shipments that's 400 pounds. And then, on top of that, you have all of the, all of the marijuana that he sold to Amonett. And this is not even considering the Pete Murray 800 pounds.

You have, also, as Mr. Piper pointed out here, all of the marijuana stripping going on up there where everybody -- must have been quite some parties up there -- where they were all smoking pot and getting paid $20 an hour for stripping marijuana up at Love Mountain or whatever it was that they had. We had quite a bit of testimony about that. And as I recall, the testimony was that it was, it took a long time to do that. You're talking days up there doing that various times.

But just with what they found at the house, what Ms. Foutch described, the Texas load, and 400, and the 400 pounds for one trip to Mexico, and we know, by the way, as I recall, I know that there was testimony from Mr. Roller himself on one of the wiretaps that he was actually traveling during the course of the wiretap he was on his way to [p.18] Mexico --

MR. PIPER: And he wished Ms. Foutch had gone with him, Judge.

THE COURT: Talking to Ms. Foutch about it. He was on his way to Mexico to get some pot.

MR. SUMMERS: There was no proof of that, Your Honor, other than him trying to get in this lady's apparel.

THE COURT: Well, I don't know about that. I have to take it -- let's put it this way. He was, he was -- that's what he said on the tape. I take him at face value. So, if you add that up, anyway, you add up what they found at the house, Texas, Nunley, I get -- well, I get 2744 pounds, which is not quite as much as the presentence report came up with, but still in excess of 2200 pounds that it takes to get him to Level 32.

Okay. So, now, we move to your objection on the firearms enhancement.

MR. SUMMERS: That's correct, Your Honor.

THE COURT: I know you've got the same objection, but yours have different facts, so --

MR. STRIANSE: Right.

THE COURT: -- we'll talk about that later.

MR. STRIANSE: I wanted to remind the Court, I also had an objection to the drug quantity that adopted Mr. Summer's objection. I didn't know if the Court would want to hear from [p.19] me.

THE COURT: We'll deal with that when we get to your, get to your case because your case has a few more different facts.

* * *

[p.60] * * *

THE COURT: All right. For the record, the defendant, Mr. Young, is present along with his counsel. No plea agreement in the case. Defendant went to trial.

For the record, Mr. Strianse, have you read the presentence report?

MR. STRIANSE: Yes, Your Honor, I have.

THE COURT: And, Mr. Young, have you read that report?

DEFENDANT YOUNG: Yes, sir.

THE COURT: Okay. Now, we dealt with two objections, one the firearms and the obstruction. Anything else that you want to raise?

MR. STRIANSE: Yes, sir. Just for the record, I realize I'm swimming against the tide on the drug quantities, but I just wanted to make one observation and make sure that I was clear for the record that I had adopted the objections made [p.61] by co-defendant Roller.

And there are only a couple of things that I wanted to draw the Court's attention to. Mr. Young because of his prior conviction is facing a 10-year minimum-mandatory sentence in this case. And the one component of the drug quantity that I wanted to talk about very briefly was Paragraph 31, the 2300 pounds. And, obviously, if the jury had credited that, they would have checked the box more than 1,000

kilograms. But I wanted to remind the Court Mr. Piper in his opening statement to the jury when we tried the case told the jury that Pete Murray would testify that this load, that 2300-pound load was not Mr. Young's load. The Court may also recall from the proof that you heard about the 2300 pounds that there was really no effort made by law enforcement to connect Mr. Young to the person that was on the manifest, there was a Hispanic man, and there were no efforts made by law enforcement to connect either Young or Roller to that individual by phone records or otherwise. None of the Hispanic individuals that were arrested on the scene and were prosecuted in the Middle District of Tennessee were ever produced as witnesses here in court. And, in fact, had never cooperated with the government and indicated that Misters Roller and Young had anything to do with this.

Agent Balsamo, I think his testimony was a little ambiguous about whether he placed Mr. Young at the scene at [p.62] the time of the delivery, although he interviewed Mr. Young, Mr. Young indicated that he did own that property jointly and had dropped off a lawnmower earlier in the day. I think the aerial surveillance that Agent Balsamo testified about was not that compelling when on cross-examination all he could say was that there was a white pick-up truck and they believed that it was connected to Mr. Young.

The Court indicated that there was testimony at trial where Morris Roller indicated that he was going to Texas, and that in the Court's mind and I think the government's mind establishes some link between Cannon County, Tennessee and Mexican marijuana. The Court may recall that the testimony was very specific, Ms. Foutch testified on September 29th, 2005,

Morris Roller had announced to her that it was his intention to travel to Dallas, Texas, presumably for this nefarious purpose of picking up marijuana. Once again, the government made no effort to corroborate that either through surveillance, contemporaneous surveillance of Mr. Roller's phone records trying to determine whether trucks of his had been taken out of state, checking fuel records, even basic airline ticket information was not checked, so, that at best was conversational.

So, I just, I did want to make that challenge to the 2300 pounds. I don't believe that the jury was convinced of that. And, as I said, the government even conceded according [p.63] to Mr. Murray Mr. Young had told him that that was quote not his load.

THE COURT: You don't have any problem with the 800 pounds being attributable to Murray's testimony?

MR. STRIANSE: I do have a problem with that. And my problem with that is that I don't believe that Mr. Murray ever testified to a specific quantity of 800 pounds. I checked --

THE COURT: Well, yeah, but he did testify to a lot of marijuana.

MR. STRIANSE: He did. But my notes indicated, and, obviously, I haven't seen the transcript, but my notes indicate that it would be several pounds here, several pounds there, but as far as quantifying it and coming up with 800 pounds, I did not find that in my notes.

THE COURT: Okay. Okay. Well, what about that, Mr. Piper?

MR. PIPER: Well, as far as quantity on Mr. Young, Judge, I think that clearly if the Court has found it with respect to Mr. Roller on 2300 pounds that Mr. Young is at least as culpable.

Secondly, Charles Wayne Goff testified that he had distributed to the defendant, excuse me, distributed to the defendant for a period in the 1990s, and I think roughly '93 through '97, December of '97 when Goff was arrested federally. As the Court may recall his testimony, he distributed over [p.64] 4,000 pounds of marijuana to the defendants, Mr. Roller and Mr. Young.

THE COURT: Who was that?

MR. PIPER: Charles Wayne Goff, G-o-f-f.

THE COURT: Was that testimony at the trial?

MR. PIPER: Yes, sir. He's the fellow from Sequatchie County that was on supervised release revocation. Mr. Strianse cross-examined him concerning the pound of marijuana that was found at his residence and he stated that it was for the Mexican who was his source of supply. As the Court may recall, he stated that he first met Mr. Young back in the early '90s or perhaps late '80s, he started distributing marijuana to him roughly, I think after Mr. Young got out of jail. And Mr. Strianse can probably correct me on this, but I believe that that's where the objection came when somebody, it was either Pete Murray or Goff, and I think it was Goff, said I started selling him

marijuana after he got out of jail. Mr. Strianse correctly took us to side bar and objected to that. And I don't even know why whoever said it said it, I don't know why they did because I've cautioned them about talking about Mr. Young being in jail, but he started selling marijuana to him after he got out of prison. He stopped in December of '97 when he was arrested and he was selling 100 pounds a month -- 50 pounds a month on two occasions, and then --

[p.65] THE COURT: Who was this, Murray?

MR. PIPER: Goff.

THE COURT: Goff.

MR. PIPER: This was Goff selling to Mr. Young. Then as the Court will recall, we had Kerry Nelson, who came in and testified that -- he was the Murfreesboro undercover police officer, the big fellow. And he stated that in February of '98, Mr. Murray approached him about getting marijuana for Jeff. Of course, Murray testified that was for Jeff Young, and that was actually supposed to be 50 pounds, as I recall, which is the same quantity he was purchasing from Goff. And Goff had been arrested and taken off the streets roughly two months before that.

My point to Your Honor is that in Mr. Young's case there is well more than 2200 pounds of marijuana. And I haven't even calculated to see to get to Level 34, I really didn't worry about that, Judge, but the 2300 pounds, Ms. Foutch testified that Mr. Young was also involved in virtually every aspect. And, in fact, Young brought marijuana to Roller on one occasion when Roller was out of marijuana for Foutch. And we know

that from testimony at the trial and we had the TBI's plane up. We saw Mr. Young arrive at the residence and then leave, and right after that, Mr. Roller delivered marijuana. Other people testified, Wayne Amonett, and did not unload on Mr. Young. He stated he did not like [p.66] Mr. Young or perhaps more correctly Mr. Young did not like him, but he had only purchased from Mr. Young on one occasion, although, that Mr. Young had accosted him about stealing marijuana that Mr. Roller and David, and I forget David's last name, were growing. Mr. Amonett stated that Mr. Young accosted him about stealing that marijuana that was growing in that patch.

So, Judge, I think that we clearly have, considering all of the testimony about the growing of the marijuana, about the distribution of the marijuana, Mr. Young's involvement goes back into the mid-'90s at least, and perhaps when he did get out of jail in Cannon County, but, clearly, also more than 2300 pounds involved. Young --

THE COURT: Okay. Here's what, here's what I recollect from the proof of the case, with respect to the quantities. Of course, I've already, with respect to Mr. Roller, included the Texas 2300 pounds in the drug calculation. I've done so because I think that the evidence supports it at least by a preponderance of the evidence. And the evidence supports it that the marijuana went to property jointly owned by Mr. Young and Mr. Roller. And the testimony about the white pick-up truck in the area that belonged to Mr. Young which was surveilled at the time of or immediately following the delivery there at Purser Road. The testimony about changing the vehicles, Mr. Roller and Mr. Young about [p.67] being afraid that

the Mexicans might be after them. The conversations on some of the tapes regarding the Mexicans. And we do know that the marijuana, that much of the marijuana, not all of it, but much of the marijuana was being distributed there did come from Mexico. So, it certainly fits.

And so, I do think it's clear to this Court that that amount of marijuana is included or should be included in drug calculation. I think also, if you, I'm looking back at Murray's, my notes on Murray's testimony, and he said he was getting marijuana from Mr. Young starting back in 1992. And he got three to five pounds a month, sometimes more. And so, I mean, assuming it was three pounds a month, I'm calculating for 15 years, that's 530 pounds. We know there was a lot more marijuana sold or delivered or dealt with than that, because we have all of the stripping plants, all of the testimony about the stripping of the plants. We don't have any specific quantities. We do know that there was a lot of marijuana, because we know that it took a long time to do that, and many people to do that. And, also, as Mr. Piper points out here, the testimony of Mr. Goff would certainly put the quantity well in excess of 2200 pounds. Of course, the Texas load itself gets it below that. So, I find that the presentence report is accurate with respect to the drug quantity.

* * *

[p.96] * * *

END OF JUDGMENT PROCEEDINGS

I, Shannan Andrews, do hereby certify that I reported in machine shorthand the proceedings in the above-styled cause held May 7, 2007, and that this transcript is an accurate record of said proceedings.

/s/_____
Shannan Andrews
Official Court Reporter